Supreme Court, U.S.
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No. 98 742

In The Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN NATIONAL FIRE INSURANCE COMPANY,

Petitioner,

v.

PACIFIC INSURANCE COMPANY, and RAIL LINK, INCORPORATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a district court limited to considering relief for a party who files a Rule 59(e) motion or does the district court retain jurisdiction to grant the other party relief upon discovering an error, especially when the action taken is related to the issue and relief requested by the moving party?

2. Because the district court granted Pacific Insurance Company's Rule 59(e) motion based on an erroneous view of applicable law, should the case have been remanded for a decision based upon the correct rule of law, or must an appellate court affirm the district court's decision so long as any possibility exists that the district court may have come to the same decision had it applied the correct rule of law?

3. The Fourth Circuit held that American Fire Insurance Company had not raised FELA's applicability prior to a non-final order, which according to the Fourth Circuit disposed of all issues in the case. May an appellate court ignore the district court's interpretation of its own order when deciding whether or not that order had resolved all issues in the case?

PARTIES TO THE CASE AND LIST OF PARENT COMPANIES AND AFFILIATES

1. The petitioner American National Fire Insurance Company. Publicly traded companies related to American National Fire Insurance Company are American Financial Corporation, American Annuity Group and American Financial Group.

2. The respondent Pacific Insurance Company. Its publicly traded parent corporation is CNA Financial Corporation.

3. The respondent Rail Link, Inc. Its publicly traded related parent corporation is Genesee & Wyoming, Inc.

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TEXAS STATUTE:

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American National Fire Insurance Company respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

CITATIONS OF OPINIONS BELOW

The relevant opinions and orders below are:

1. The Fourth Circuit Court of Appeals' Opinion dated July 7, 1998 and published at Pacific Insurance Co. v. American National Fire Ins. Co., et al., 148 F.3d 396 (4th Cir. 1998). (A. 1-19).

2. The August 4, 1998 order denying American National's petition for rehearing. (A. 20).

3. The district court's November 10, 1997 opinion. (A. 24-32).

4. The district court's order entered November 10, 1997 and as amended on November 14, 1997. (A. 21-23).

5. The district court's July 30, 1997 opinion granting American National Fire Insurance judgment. (A. 34-36).

6. The district court's July 30, 1997 final judgment. (A. 33).

7. The district court's April 3, 1997 order. (A. 37).

8. The district court's December 16, 1996 opinion. (A. 39-41).

9. The district court's December 16, 1996 order. (A. 38).

10. The district court's September 20, 1996 final order. (A. 42).

11. The district court's August 21, 1996 opinion. (A. 44-46).

12. The district court's August 21, 1996 order. (A. 43).

BASIS FOR JURISDICTION

American National Fire Insurance Co. ("American National") seeks a review of the opinion and order of the Court of Appeals for the Fourth Circuit entered on July 7, 1998 and the August 4, 1998 order denying American National's petition for rehearing which it had timely filed on July 21, 1998.

This Court has jurisdiction to entertain this petition based upon 28 U.S.C. § 1254(1) and Rules 10, 12 and 13 of this Court.

RELEVANT STATUTES AND RULES

The relevant statutes and Rules are:

1. Fed. R. Civ. Proc. 59(e):

> Any motion to alter or amend judgment shall be filed no later than 10 days after entry of judgment.

2. 45 U.S.C.§ 51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or further commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be

considered as entitled to the benefits of this chapter.

3. 45 U.S.C.§ 55:

Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any such action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

4. Texas Rev. Civ. Stat. Ann. Art. 6432:

Every person, receiver, or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this State, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employee of such person, receiver or corporation, and the fact that such servants or employees were

fellow-servants with each other shall not impair or destroy such liability.

STATEMENT OF THE CASE

The defendant Rail Link, Inc. is a railroad company that provides switching operations at various manufacturing plants. (A. 86). Through its wholly owned and controlled subsidiaries, Rail Link also operates common carrier railroads, often referred to as shortline railroads. (A. 79-87). Rail Link dominates and controls these shortline railroads. (Id.; A. 35-36). As a railroad company, Rail Link also leases engines, constructs tracks, maintains tracks, and cleans railroad cars. (A. 86-87). Of all its railroad operations, Rail Link created subsidiaries only for its shortline railroads, which are covered by the Federal Employers Liability Act. (A. 36).

A dispute arose among the parties when a Rail Link employee, Christopher Womack, was catastrophically injured in connection with one of Rail Link's switching operations. At the time of the accident, Pacific Insurance Company ("Pacific") provided Rail Link with a five million dollar comprehensive railroad liability policy and American provided Rail Link with a four million dollar excess policy. Mr. Womack did not sue under the Federal Employers Liability Act but instead sued Rail Link under a comparable state statute known as the Texas Railroad Liability Act. Tex. Rev. Civ. Stat. Art. 6432. American National's policy excluded any claims which would be covered by FELA. (A. 90). Pacific's policy generally excluded employers liability but expressly covered any claims to which FELA would apply. (A. 88-89).

Pacific filed a declaratory judgment action against Rail Link and American National. Although a dispute existed between Pacific and American National concerning which company provided coverage, they both wanted to cap the possible exposure. Consequently, all the interested parties entered into an agreement to settle the underlying injury claim for 4.3 million dollars, pursuant to a total reservation of rights. Under the agreement, American National and Pacific each advanced approximately 1.86 million dollars, together with a complete reservation of rights. Whoever was found in the declaratory judgment action to provide coverage for the Womack accident would reimburse the other. If neither Pacific nor American National provided coverage, they would each absorb the loss of the funds they each had advanced. (A. 53).

In its answer and counterclaim in the declaratory judgment action, American National denied it provided coverage, and asserted that if it did provide coverage, any coverage would be in excess of Pacific's five million dollar policy. (A. 49-52). Because American National believed FELA may apply, American National further alleged that the Womack claim was not cognizable under the Texas Act. Id.

On July 23, 1996, Pacific filed a Rule 12(c) motion. In the motion, Pacific did not ask for a money judgment, but sought a declaration that Pacific's policy excluded the Texas Act and American National's policy covered the Texas Act. At the August 15, 1996 hearing on Pacific's motion, the district court asked if Pacific's motion would resolve all issues. (A. 54). American National's counsel stated that it would not resolve all issues and expressly advised the court that one of the remaining issues would be whether the claim was in fact cognizable under the Texas Act or whether FELA

applied. Id.

On August 21, 1996, the district court ruled that Pacific's policy did not cover the Texas Act. The parties then scheduled a hearing to discuss the scope of the ruling. At the hearing, Pacific for the first time indicated it would seek money damages. American National maintained that any request by Pacific for money damages was premature. American National argued that FELA applied to the Womack accident. (A. 55-59). Consequently, a declaration concerning the state law claim did not resolve all matters because Pacific had to prove Womack in fact was not covered by FELA at the time of the accident before it could receive a money judgment. Id. The district court instructed Pacific to file a motion and brief by September 19, 1996, and for American National to file a reply by September 25, 1996. (A. 59-60). When Pacific missed its deadline on September 20, 1996, the district court on September 20, 1996 dismissed the action without awarding either party any damages. (A. 42, 47).

Pacific filed a Rule 59(e) motion seeking money damages. Rather than note a separate Rule 59 motion, American National elected to note an appeal and also to respond to Pacific's motion. In its response to Pacific's motion, American National argued Pacific had not established FELA did not apply and that before damages could be awarded *to any* party, FELA's applicability had to be addressed. (A. 63-77). American National asked that Pacific's motion be denied, or that a jury be held on FELA's applicability. (A. 77).

On December 16, 1996, the district court agreed with American National. It held that its August 21, 1996 order

addressed only the state law issue and that it had to determine whether Womack was covered by FELA at the time of the accident before awarding any damages. (A. 39-41). The district court also held the parties had reserved the FELA issue by entering into a reservation of rights agreement. (A. 40-41). It therefore denied Pacific's 59(e) motion and directed the parties to address the FELA issue. (A. 38,41). Pursuant to the court's direction, the parties submitted evidence and briefs, both of which expressly requested money damages.

Based on the uncontroverted evidence Rail Link dominated and controlled its shortline railroads, on July 30, 1997, the district court held that the shortlines railroad operations were imputed to Rail Link and therefore Womack was in fact covered by FELA at the time of the accident. (A. 35-36). The district court also found that Rail Link had created its wholly owned and controlled shortline railroad subsidiaries in order to circumvent FELA in violation of 45 U.S.C. § 55. (A. 36). Based on its findings, the district court then awarded American National 1.86 million dollars.

Pacific filed another Rule 59(e) motion. The district court then reversed itself. It held that in order to award American National a judgment, American National had to first file a specific motion requesting a money judgment, despite the fact the district court had *sua sponte* advised the parties it would grant judgment on the FELA issue based on the record before it. (A. 37,38,41). It then held that Pacific should receive a money judgment because the underlying settlement agreement, although ambiguous, precluded American National from litigating FELA's applicability. (A. 29-31). Without citing Virginia law, the district court held that recognized legal principles and practice prevent an

insurance company from raising issues that were not raised or decided in the underlying personal injury action. Id. The district court reasoned that because Womack had not asserted FELA and Rail Link had not raised FELA as a preemption defense, the settlement precluded American National from raising FELA as a coverage defense in the declaratory judgment action. Id.

The Court of Appeals did not address the issue whether the settlement precluded litigating FELA. Nor did it address whether Womack's accident arose under FELA. It instead held the district court did not have jurisdiction to consider the FELA issue after its September 20, 1996 final order because only Pacific had filed a Rule 59(e) motion. It therefore affirmed the decision below.

The respondent Pacific Insurance Company filed this declaratory judgment action in the United States District Court for the Eastern District of Virginia, Richmond Division, based on a complete diversity of citizenship with the amount in controversy exceeding 50,000 dollars. See 28 U.S.C. § 1332.

The Fourth Circuit Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291. The appeal was taken from a final order disposing of all claims entered on November 10, 1997 and as amended on November 14, 1997. The amended Notice of Appeal was timely filed on December 5, 1997 pursuant to Fed. R. App. P. 3 and 4.

ARGUMENT

I. A Split of Authority Exists Concerning the Scope of Fed. R. Civ. Proc. 59(e).

The Court of Appeals held the district court lacked jurisdiction to consider the FELA issue after September 20, 1996 because American National had not filed a Rule 59(e) motion but had instead raised the issue in opposition to Pacific's Rule 59(e) motion. Such a ruling conflicts with existing case law. Indeed, it even contradicts a prior Fourth Circuit decision

In United States v. Hollis, 424 F.2d 188, 191, (4th Cir. 1970), the court explained that a district judge should not be forced to perpetuate an erroneous finding or conclusion of law:

> Appellee's argument is that since the plaintiff's motion to amend was related to the quantum of the damage award, the judge was limited to a consideration of that point and was without authority to amend the order in respect to Hollis' negligence. The argument is without force, for a district judge is not restricted to the modifications suggested by the parties.

United States v. Hollis, 424 F.2d 188, 191 (4th Cir. 1970).

The Tenth Circuit has expressly adopted the Hollis reasoning as it applies to Rule 59(e). According to that circuit court, a district court may modify a judgment for any reason so long as a valid Rule 59(e) motion is before it:

> The salient fact is that a motion to amend judgment *was* timely filed. Such gave the district court the power and jurisdiction to amend the judgment for any reason, if it chose to do so, and it was not limited to the ground

set forth in the motion itself.

Varley v. Tampax, Inc., 855 F.2d 696, 699 (10th Cir. 1988). See also Charles v. Daley, 799 F.2d 343, 347 (7th Cir. 1986). But see Sun-Tek Industries, Inc. v. Kennedy Sky Lites, Inc., 848 F.2d 179, 182 (Fed. Cir. 1988), cert. denied, 488 U.S. 1009 (1989).

However, according to the decision below, while a district court retains jurisdiction of a case once a Rule 59(e) motion is timely filed, the district court cannot correct an obvious mistake of law or fact if that mistake benefited the moving party. This is apparently true even if the mistake relates to the issue raised in the Rule 59(e) motion. In this case, the district court had declared that Pacific's policy did not cover the Texas Act. Only after entry of the September 20, 1996 final order did Pacific move for money damages. The district court then expressly recognized that in order to grant money damages, the court would have to determine whether Womack was actually covered by FELA. (A. 39-41). The district court then granted American National judgment after determining that Womack's accident in fact arose under FELA.[1]

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[1]The district court later vacated American National's judgment based on the mistaken belief the settlement precluded litigating FELA's applicability. As set forth below, that holding was incorrect. But in any event, the court's interpretation of its August 21, 1996 order remains. As the district court recognized, the August 21, 1996 order and the September 20, 1996 order were never intended to address FELA's applicability or whether Pacific was entitled to damages.

But according to the Court of Appeals, the district court could grant Pacific a money judgment without addressing FELA's applicability because American National did not file an independent Rule 59(e) motion. Thus, the district court could grant a 1.86 million dollar judgment in favor of Pacific even though the district court factually determined that FELA applied and therefore Pacific's policy and not American National's policy covered the Womack accident. American National respectfully submits that such an interpretation of Rule 59 makes little sense and leads to unjust and arbitrary results.[2]

Rule 59(e) contains more ambiguity than any other Federal Rule of Civil Procedure. Indeed, Rule 59(e) is silent as to the scope of the district court's jurisdiction. Moreover, this Court has never addressed the limits, if any, of a district court's jurisdiction under Rule 59(e). As it now stands, the bar is uncertain to what extent a district court may take action when a Rule 59(e) motion is filed.

American National noted an appeal and also correctly argued in response to Pacific's Rule 59 motion that FELA's applicability had to be addressed before Pacific could receive damages. Rule 59(e) should not be read to prevent a district court from considering issues that directly relate to whether a Rule 59 motion should be granted. Rule 59 is an often used and vital rule, and the published decision below would have a profound effect on trial practice while causing grave injustices to result. When a district court retains jurisdiction of a case,

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[2]Based on the Court of Appeals' interpretation of Rule 59, the Court of Appeals did not bother to address whether under applicable state law the settlement preserved or precluded the FELA issue.

the rule should not coerce the court into perpetrating a manifest error and injustice.

This case demonstrates the fallacy below. The district court recognized that its August and September, 1996 orders only dealt with the Texas Act. The district court then found that Pacific and not American National provided coverage for the Womack accident. Rule 59(e) does not require the district court to saddle American National with a two million dollar judgment for an accident it did not cover. American National respectfully submits that this Court should grant its petition so that it can define the scope of Rule 59(e) and eliminate the confusion which is sure to result from the published decision below.

II. The District Court Mistakenly Believed that the Settlement Precluded American National from Litigating FELA's Applicability. Because the District Court Granted Pacific's Rule 59 Motion Based Upon an Erroneous Rule of Law, The Court of Appeals Should Have Remanded the Action.

The district court at first found that the parties had reserved the right to litigate FELA's applicability and accordingly granted American National judgment for 1.86 million dollars. (A. 33-36; 39-41). But the district court later reversed itself and held that as a matter of law the settlement had not preserved the FELA issue. According to the district court, although the agreement was "ambiguous," under general insurance law, the settlement of an underlying action precludes litigating any issue or claim not raised in the settled action. (A. 29-31).

As American National demonstrated, the district court erred as a matter of law. A conflict of interest existed between American National and Rail Link. American National wanted to assert FELA as a preemption defense to the Texas Act, and Rail Link wanted to avoid reference to FELA at all costs. Thus, because of the conflict, American National was not bound or limited by the pleadings or issues raised in the underlying personal injury action. This would be true even if the injury action had proceeded to judgment. State Farm Ins. Co. v. Mabry, 255 Va. 286, 497 S.E.2d 844 (1998); Reisen v. Aetna Life Ins. Co., 225 Va. 327, 302 S.E. 2d 529 (1983); Stout v. Grain Dealers Mutual Ins. Co., 307 F.2d 521, 524 (4th Cir. 1962); Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793, 799-800 (4th Cir. 1949), cert. denied, 339 U.S. 914 (1950); Fireman's Fund Ins. Co. v. Rairigh, 59 Md. App. 305, 475 A.2d 509 (1984); American Motorists Ins. Co. v. American Employers' Ins. Co., 608 F.2d 624 (5th Cir. 1979). When a conflict exists, the insurer is entitled to its day in court to determine whether the accident in fact is covered under its policy. Id.; see also, State Farm Fire & Cas. Co. v. Garrity, 785 F.2d 1225, 1227-28 (4th Cir. 1986). This is especially true when the carrier only provides an excess policy and never had an opportunity to control the litigation. Crawford v. Pope Talbot, Ins., 206 F.2d 784 (3d Cir. 1953). Consequently, American National was entitled to litigate FELA's applicability in this declaratory judgment action. By definition, a settlement pursuant to a total reservation of rights preserves the *status quo ante*. It does not prejudice American National's rights by precluding American National from litigating issues that it could have litigated had the Womack action proceeded to judgment.

Thus, the district court granted Pacific's second 59(e) motion based on an incorrect assumption, *i.e.*, that the

settlement had precluded American National from raising FELA as a coverage defense. When a district court applies an incorrect rule of law in deciding a Rule 59 motion, the case should be remanded so that the district court can properly exercise its discretion by using the correct legal test. This is especially true when the Court's use of an incorrect rule of law served as the basis for vacating a 1.86 million dollar judgment previously entered in favor of American National and instead awarding 1.86 million dollars to Pacific.

However, the Fourth Circuit did not remand the action or address the preclusion issue. According to the court, it was irrelevant whether the settlement precluded or preserved the FELA issue as a coverage defense. The Court of Appeals instead essentially held that an appellate court will uphold a district court's decision on a Rule 59(e) motion even if the district court relied upon an improper rule of law, so long as it was possible that the district court could have come to the same conclusion using the proper legal test. That rule is in conflict with decisions from other circuits, and should be rejected. When a court makes a discretionary decision, it must utilize proper legal principles. Reliance on erroneous rules of law constitutes an abuse of discretion and should require a remand. Gates v. L.G. Dewitt, Inc., 528 F.2d 405, 410 (5th Cir. 1976); Southern Pacific v. Guthrie, 186 F.2d 926, 932 (9th Cir. 1951); Magee v. General Motors Corp., 213 F.2d 899, 900 (3rd Cir. 1954).

II. The District Court Held That its August 21, 1996 and September 20, 1996 Orders Only Dealt with Whether Pacific's Policy Generally Covered the Texas Act. The District Court Also Held That Before it Could Determine Whether Pacific Was Entitled to Money, The Court Had to Determine Whether FELA Applied to the Womack Accident. But the Court of Appeals Held That the August 21, 1996 Order Resolved All Issues in the Case. The Court of Appeals Thereby Ignored the District Court's Own Interpretation of its August 21, 1996 Opinion.

The Fourth Circuit held that American National did not apprise the district court of the FELA issue prior to the August 21, 1996 opinion. That holding was factually incorrect. Even the district court acknowledged that at the August 15, 1996 hearing, American National had apprised the district court of the FELA question and had advised the court that not all issues would be resolved by a ruling on Pacific's 12(c) motion. (A. 40-41).

The Fourth Circuit further held that American National's extended FELA discussion at the September 13, 1996 hearing did not preserve the FELA issue for appeal. According to the Court, while the August 21, 1996 opinion was not a final order, it dispensed with all the issues in the case. The extended discussion on September 13, 1996 was therefore considered untimely.

In so ruling, the Fourth Circuit has contradicted at least one other circuit opinion which has held that an order is not final in a declaratory judgment action until all issues are

decided, including the exact relief being granted. American Interinsurance v. Occidental Fire and Cas. Co. of North Carolina, 835 F.2d 157 (7th Cir. 1987).

More importantly, the Fourth Circuit has ignored the district court's interpretation of its August 21, 1996 order. The district court expressly held the order had not addressed all the issues before the court and that until the district court addressed FELA's applicability, the court could not decide which party, if any, was entitled to damages. As the district court explained:

> This Court found that Pacific Insurance Company's policy did not cover liability under the Texas Railroad Act. In its September 20 Order, the Court reaffirmed its prior ruling that . . .Pacific's . . . policy did not cover liability under the Texas Railroad Act and found the remaining counts moot. Thus, under the Texas Railroad Act, Plaintiff [Pacific] is not responsible for covering the Womack action and can seek repayment from Defendant.
>
> Plaintiff now seeks a judgment from this Court awarding it the money it paid to Womack. If the Court had fully settled the issue of liability then the money would be appropriately awarded. The Court, however, has not resolved all liability issues. The Court has not addressed the question of whether FELA preempts Womack's claim. If FELA does preempt Womack's claim then Defendant's policy would not cover the

> liability and Plaintiff's policy would. In their settlement agreement, Plaintiff and Defendants agreed to reserve all coverage issues for later litigation and liability hinges on whether Womack's claim is preempted by FELA or properly brought under the Texas Railroad Act.

(A. 40).

Consequently, American National's extended discussion of FELA at the September 13, 1996, hearing timely preserved the FELA question for a direct appeal independent of a Rule 59 motion. As a result, neither the district court nor Pacific ever suggested that American National failed to preserve the FELA issue.[3]

Furthermore, the opinion contradicts a decision from at least one other circuit court which has held that an appellate court should accept the district court's reasonable interpretation of its own order. U.S. v. Sepulveda, 15 F.3d 1161, 1177 (1993); cert. denied 512 U.S. 1223 (1994). The Court of Appeals below instead essentially held that an appellate court may adopt any interpretation of an order that would justify affirming the decision below. American National respectfully submits that such a decision is a dangerous precedent because it prevents parties from relying upon the direction and express explanation of the district

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[3]In its opinion, the Fourth Circuit ruled that American National had not timely raised FELA apparently based on its power of plenary review without benefit of briefs or argument.

court which issued the opinion in question.[4]

CONCLUSION

The decision below was not only wrongly decided, but more importantly, it conflicts with decisions of other circuits. And on the issue concerning the scope of Rule 59(e), it provides this Court with an opportunity to resolve an unsettled question which has never been addressed by this Court but which could have an enormous impact. This Court has never addressed the scope of a district court's jurisdiction once a Rule 59(e) motion has been filed, and it has not addressed what if any nexus must exist between the motion and the action taken by the district court. This case demonstrates the need to address the issue. Womack's accident arose under FELA and therefore Pacific and not American National afforded coverage. But Pacific received a 1.86 million dollar judgment as a result of its Rule 59(e) motion based on the Fourth Circuit's theory that American National had to file a separate Rule 59(e) motion and could not rely upon its objection to Pacific's motion. Rule 59 is designed to correct errors and injustices, not create them.

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[4]The district court's interpretation underscores the need upon remand to address whether the settlement precluded American National from litigating FELA's applicability. The district court subsequently granted Pacific 1.86 million dollars because it later decided that the settlement precluded litigating the FELA issue. Because the August and September 1996 orders did not and were not intended to address FELA's applicability or whether a party was entitled to money damages, then *ipso facto* Pacific is not entitled to judgment if the settlement in fact reserved American National's right to litigate FELA's applicability.

WHEREFORE, American National Fire Insurance Company prays that this Court grant this petition for writ of certiorari, reverse the decision of The Court of Appeals and either reinstate the judgment in favor of American National or remand the case for further proceedings.

RESPECTFULLY SUBMITTED,

AMERICAN NATIONAL FIRE INSURANCE COMPANY

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PACIFIC INSURANCE COMPANY,
Plaintiff-Appellee,

v.

AMERICAN NATIONAL FIRE INSURANCE COMPANY,
Defendant-Appellant,

RAIL LINK, INCORPORATED,
Defendant-Appellee.

No. 96-2468

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., Senior District Judge.
(CA-96-22)

Argued: May 7, 1998

Decided: July 7, 1998

Before ERVIN and HAMILTON, Circuit Judges, and BLAKE,
United States District Judge for the District of Maryland,
sitting by designation.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Ervin and Judge Blake joined.

COUNSEL

ARGUED: William Henry Shewmake, SHEWMAKE, BARONIAN & PARKINSON, Richmond, Virginia, for Appellant. Scott L. Carey,

BATES, MECKLER, BULGER & TILSON, Chicago, Illinois, for Appellee Pacific Insurance; Gary Joseph Spahn, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellee Rail Link. **ON BRIEF:** Samuel Baronian, Jr., SHEWMAKE, BARONIAN & PARKINSON, Richmond, Virginia, for Appellant. Monica T. Sullivan, BATES, MECKLER, BULGER & TILSON, Chicago, Illinois; John H. O'Brion, Jr., COWAN & OWEN, P.C., Richmond, Virginia, for Appellee Pacific Insurance. Robert A. Angle, MAYS & VALENTINE, L.L.P., Richmond, Virginia, for Appellee Rail Link.

OPINION

HAMILTON, Circuit Judge:

American National Fire Insurance Company (American National) appeals the district court's entry of judgment in favor of Pacific Insurance Company (Pacific) in this dispute involving which company's insurance policy, issued to the insured, Rail Link, Inc. (Rail Link), covers the settled claim of Charles Womack, a former employee of Rail Link. Because we hold that the district court did not abuse its discretion in reversing its previous entry of judgment in American National's favor and properly granted judgment on the pleadings to Pacific, we affirm.

I.

Rail Link is a railroad company that provides switching operations at various manufacturing plants. Rail Link also provides other railroad services to some of the companies it serves, including leasing and maintaining railroad engines, maintaining and repairing railroad tracks, and cleaning boxcars. In addition to providing contractual switching services for various companies and manufacturers, Rail Link is also the parent of two wholly-owned subsidiary corporations that operate "shortline" railroads. These subsidiaries operate short distance railroad connections in North Carolina and Virginia. Rail Link's president, James Benz, and its general manager, William Jasper, are the sole officers and directors of Rail Link's shortline subsidiaries.

At all times relevant to this litigation, Rail Link maintained three liability insurance policies. First, Rail Link purchased a $500,000 liability policy from the Hartford Insurance Company (the Hartford Policy). Second, Rail Link purchased a $5 million comprehensive railroad liability policy (the Pacific Policy) from Pacific. Third, Rail Link purchased a $4 million excess liability policy (the American National Policy) from American National.

Several provisions of the Pacific Policy and the American National Policy are pertinent to this appeal. First, the Pacific Policy contains an exclusion, known as Exclusion F, which states:

> This policy does not apply to:
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> . . .
>
> F. Any liability imposed on the Insured under any of the following:
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> 1. the Employees' Retirement Income Security Act (ERISA) of 1974 as now or hereafter amended;
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> 2. any uninsured motorists, underinsured motorists, automobile no-fault or first party personal injury law;
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> 3. any workers compensation, employers liability (but this does not apply to the Federal Employers' Liability Act; see Employers Liability definition), occupational disease, unemployment compensation, retirement or disability benefits law or statute; or
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> 4. any law similar to 1., 2., or 3. above.

(J.A. 49). The Pacific Policy also defines "Employer's Liability" as "liability imposed on the Insured for Bodily Injury sustained by employees of the Insured in the course of their employment under the Federal Employers Liability Act, U.S. Code (1970) Title 45, Chapter 2, Sections 51-60 and as amended." (J.A. 63).

With respect to the American National Policy, it specifically incorporates certain scheduled underlying policies, including the Hartford Policy. The Hartford Policy and, therefore, the American National Policy exclude claims brought pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60, providing that "[t]his insurance does not cover: . . . bodily injury to any person in work subject to the Federal Employer's Liability Act . . ., any other federal laws obligating an employer to pay damages to an employee due to bodily injury arising out of or in the course of employment, or any amendments to those laws." (J.A. 114). The American National Policy also provides that American National is not required "to assume charge of the settlement or defense of any claim, suit or proceeding against [the insured]." (J.A. 76).

On January 14, 1995, Womack slipped from a railcar while performing switching operations and suffered catastrophic injuries, including multiple amputations. The injury occurred at a Lubrizol, Inc. plant in Texas, and Womack subsequently filed suit against Rail Link and others in a diversity action in the United States District Court for the Southern District of Texas under the Texas Railroad Liability Act (TRLA), Tex. Rev. Civ. Stat., Art. 6432-6443 (the Underlying Action). Womack sought $52 million in damages under the TRLA; Womack did not assert a claim under FELA. Rail Link subsequently reported the claim to its insurers, including Pacific and American National. Because the Hartford Policy was the primary policy, the defense of the Underlying Action was not tendered to either Pacific or American National.

Rail Link and its insurers then attempted to negotiate a settlement of Womack's claim. During the course of the settlement negotiations, however, a dispute arose over which insurer's policy offered coverage for the Underlying Action. As a result of this dispute, on January 19, 1996, Pacific filed this diversity action in the United States District Court for the Eastern District of Virginia against Rail Link and American National, seeking a declaratory judgment as to which company's policy covered the Womack accident. In its complaint, Pacific alleged that it was not liable for covering the Underlying Action because it did not provide any coverage for any accident arising under the TRLA. American National filed an answer, maintaining that its policy also did not provide coverage for the Womack incident.

In February 1996, the district court held a settlement conference in which all of the parties to the Underlying Action participated, including Womack's attorneys. Ultimately, the parties agreed to settle the Underlying Action for $4.3 million. The entire employer's liability limit of $500,000 under the Hartford policy was paid in connection with the settlement, while American National and Pacific each agreed to pay $1.86 million with a reservation of rights against the other to litigate which insurer's policy covered the Underlying Action. The terms of the settlement were recorded before the district court by a court reporter, and in memorializing the reservation of rights agreement between Pacific and American National, counsel for American National stated:

> The payments by Pacific and American National Fire Insurance Company are made with the understanding and agreement between them that Pacific and American National agree that they are reserving their rights against each other and agree to litigate post the settlement in the Womack case as between themselves, that they will litigate the various issues of coverage under their respective policies.
>
> Secondly, they agree that with respect to the applicability of exclusion under Pacific's policy, that issue would be preserved, and if determined that that exclusion applies to Rail Link, Inc. for coverage for the Womack action in settlement, American National will be obligated to reimburse Pacific.
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> Thirdly, the above-stated stipulation with regard to the exclusion would not apply if somehow American National was determined not to owe coverage to Rail Link for the Womack action in settlement.
>
> In the event that Pacific and American National were determined to both provide coverage to Rail Link for the Womack action and settlement, the issue of priority as between their coverage is agreed to be decided and agreed to effect a reimbursement to carry out the final judicial determination of that issue.

(J.A. 181-82).

After the settlement of the Underlying Action, Pacific amended its complaint to incorporate the terms of the settlement agreement. In response to Pacific's amended complaint, American National filed an amended answer, a counterclaim against Pacific, and a cross-claim against Rail Link, seeking a declaration that American National had no obligation to indemnify Rail Link for liability in the Underlying Action. Because Pacific and American National agreed not to seek reimbursement from Rail Link, Rail Link remained only a nominal party to the declaratory judgment action and had no active role in the litigation.

On July 23, 1996, Pacific moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). In its motion and memorandum in support of its motion, Pacific argued that the Pacific Policy provided no coverage for the Underlying Action, while the American National Policy did provide coverage, because the Underlying Action was brought under the TRLA, rather than FELA, and the Pacific Policy excluded all employers' liability claims except those asserted under FELA. American National opposed Pacific's motion and argued that, because of an ambiguity in the Pacific Policy, Pacific was liable for Womack's TRLA claims asserted in the Underlying Action. American National did not argue that the Underlying Action could have been or should have been brought under FELA.

On August 21, 1996, the district court granted Pacific's motion for judgment on the pleadings as to Count I of the complaint, agreeing with Pacific that its policy excluded coverage because the Underlying Action was brought under the TRLA. On September 13, 1996, the district court held a hearing to clarify whether its August 21 order granting Pacific's motion for judgment on the pleadings disposed of the case. During that hearing, *for the first time*, American National argued that FELA preempted Womack's claims under the TRLA, making the Underlying Action a FELA case, not a TRLA case, and rendering the Pacific Policy applicable and not the American National Policy.[1]

[1]Although American National briefly mentioned the applicability of FELA at a hearing held on August 15, 1996 concerning Pacific's motion

On September 20, 1996, the district court entered an order holding that its August 21 order granting Pacific judgment on the pleadings as to Count I of the complaint mooted all other counts of the complaint. The district court therefore dismissed the action.

In response to the district court's order, American National filed a notice of appeal. In its notice of appeal, American National identified the district court's failure to rule on the FELA question as one of the appealable issues.

On October 3, 1996, Pacific filed a motion to amend the judgment to request monetary damages consistent with the declaratory relief, pursuant to Federal Rule of Civil Procedure 59(e). Specifically, Pacific requested judgment in its favor in the amount of $1,861,331.38, plus pre-judgment interest and allowable costs, representing the amount that American National had agreed to reimburse Pacific once the coverage issues were resolved in Pacific's favor.

In response to Pacific's motion to amend the judgment, American National argued that an award of damages to Pacific was inappropriate because Pacific had not established that FELA did not preempt Womack's TRLA claims, such that Pacific would be liable for coverage. American National asserted that Pacific's avenue for relief was appeal and requested that Pacific's motion be denied. Alternatively, American National requested that a trial on the merits on the applicability of FELA to the Underlying Action be held by the district court.

In support of its opposition to Pacific's motion to amend the judgment, American National filed the affidavit of its director of commercial liability claims, James Danehy, who handled the Womack claim on behalf of American National. In his affidavit, Danehy stated that because American National did not approve of the way Rail Link was handling the defense of the Womack claim, he agreed, on behalf of American National, to enter into the settlement agreement on February 15, 1996. According to Danehy, under the terms of the agreement

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for judgment on the pleadings, American National did not argue that FELA preempted Womack's claims under the TRLA at that hearing or at any time prior to the district court's entry of judgment on the pleadings in favor of Pacific.

and in consideration for American National's payment of $1.86 million, the parties agreed that the insurance carriers could litigate all legal and factual issues concerning the insurance coverage, including whether FELA applied to the Underlying Action and was therefore a defense to coverage under the American National Policy. Danehy stated further that this total reservation was important to American National because it permitted American National to raise and pursue defenses and issues that Rail Link and Hartford had no interest and/or incentive in pursuing.

On December 16, 1996, the district court entered a memorandum opinion and order denying Pacific's motion to amend the judgment and ordering the parties to brief and argue the applicability of FELA to the Underlying Action. In its memorandum opinion, the district court stated that it had not fully settled the issue of liability when it granted Pacific's motion for judgment on the pleadings and that if FELA applied to preempt Womack's claim under the TRLA, the American National Policy would not cover the liability, while the Pacific Policy would. The district court stated further that after examining the language of the settlement conference and considering the representations that the parties made during the various hearings before the district court, it found that American National and Pacific left all issues of coverage open, including whether FELA preempted Womack's claim. The district court concluded that it would deny Pacific's motion to amend the judgment and asked the parties to address the FELA coverage issue in written briefs.

Pacific and American National subsequently filed briefs on the issue, while Rail Link responded only to discovery requests propounded by American National, in which Rail Link denied that it was subject to FELA or that it had maintained its subsidiaries in an effort to circumvent FELA.[2] Without hearing oral argument on the matter,

[2]In order to establish that FELA preempted Womack's claims under the TRLA, American National had to establish that Rail Link could be held liable under FELA as a common carrier by railroad through the actions of its subsidiaries. *See* 45 U.S.C. § 51. To this end, American National argued that the shortline subsidiaries were the "alter-ego" of Rail Link, such that their acts could be imputed to Rail Link, and that Rail Link established the shortline subsidiaries in an effort to circumvent FELA.

on July 30, 1997, the district court entered a memorandum opinion and order in which it held that FELA applied to preempt Womack's claim under the TRLA because Rail Link operated as a common carrier by railroad, engaged in interstate commerce, and Womack's duties touched upon interstate commerce. With respect to the applicability of FELA to Rail Link's operations, the district court found that the activities of Rail Link's shortline subsidiaries could be imputed to Rail Link because it owned and controlled the subsidiaries completely and, therefore, Rail Link could be considered to be a common carrier. The district court found further that Rail Link created the subsidiaries in an effort to circumvent FELA, conduct prohibited by FELA. Finally, the district court found that Womack's duties affected interstate commerce in that the Lubrizol plant, where Womack was working, received products from other states and shipped them out of the state, such that Womack's duties touched upon interstate commerce. The district court concluded that FELA preempted Womack's TRLA claims in the Underlying Action and that because the Pacific Policy included coverage for claims asserted under the FELA, Pacific was liable in the amount of $1.86 million to American National.

On August 11, 1997, American National moved the district court for pre-judgment interest. On August 13, 1997, Pacific filed a motion pursuant to Federal Rule of Civil Procedure 59(e) to reconsider the district court's July 30 order granting judgment in American National's favor. In its Rule 59(e) motion, Pacific argued that the district court should never have considered the FELA issue because the district court was not permitted to look beyond the pleadings in the Underlying Action to decide which policy covered the Womack incident and, since Womack asserted claims only under the TRLA, Rail Link was only subject to liability under the TRLA when the claim was settled. Although only a nominal party, on August 11, 1997, Rail Link also filed a motion to alter or amend the judgment under Rule 59(e). In its motion, Rail Link argued that the district court's decision was unsupported by the facts and the evidence and requested that the district court exercise its discretion to vacate its order to enable the parties to fully develop the factual record on the applicability of FELA to Rail Link's operations.

On November 10, 1997, the district court entered another memorandum and order granting Pacific's motion to reverse its earlier order

of July 30, 1997 and entering judgment in favor of Pacific in the amount of $1.86 million plus pre-judgment and post-judgment interest. In its opinion, the district court noted, first, that one of the grounds on which a Rule 59(e) motion could be granted was to correct a clear error of law or to prevent a manifest injustice. The district court then held that it had made such a clear error of law, one which would result in manifest injustice, when it considered and decided the applicability of FELA to Womack's claim notwithstanding the judgment already entered in Pacific's favor in September 1996. The district court noted that the only motion before the court at the time it decided to rule on the FELA issue was Pacific's motion to amend the judgment to include a monetary award. The district court then held that it should not have considered and decided the applicability of FELA to the Underlying Action because it did not have before it any pleading or motion upon which relief for American National could have been granted. The district court also held that it had erred in rendering judgment in favor of American National because in considering which company's policy covered the Underlying Action, the district court should have confined itself to deciding whether the claim *as settled* was covered by the policy, not the merit of the Underlying Action or the applicability of FELA to it, where the settled claim was a claim pursued under the TRLA, not FELA. Finally, the district court held that it had erred in holding that the parties reserved the right to litigate the applicability of FELA to the Underlying Action in the settlement agreement.

Therefore, the district court reversed its July 1997 judgment in favor of American National and entered judgment in favor of Pacific in the amount of $1.86 million plus pre- and post-judgment interest. In addition, the district court held that Rail Link's motion to alter or amend the judgment was moot, as was American National's motion to amend the judgment. The district court then dismissed the action.

On December 5, 1997, American National filed an amended notice of appeal. On appeal, American National argues: (1) that the district court erred in granting Pacific's Rule 59(e) motion to alter or amend the July 30, 1997 judgment entered in American National's favor; and (2) that the district court erred initially when it granted Pacific's motion for judgment on the pleadings, holding that the Pacific Policy

excluded coverage for liability imposed under the TRLA. We consider each asserted error in turn.

II.

American National first argues that the district court erred in reversing its July 30, 1997 judgment in favor of American National, holding that it was procedurally improper for the district court to have considered American National's FELA argument and ultimately to have entered judgment in favor of American National in the absence of any motion by American National requesting relief. We review a district court's decision on a motion to alter or amend the judgment under Rule 59(e) for abuse of discretion. *See EEOC v. Lockheed Martin Corp., Aero & Naval Sys.*, 116 F.3d 110, 112 (4th Cir. 1997); *Collison v. Internat'l Chem. Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994). A district court abuses its discretion when it fails to take relevant factors intended to guide its discretion into account or when it acts on the basis of "legal or factual misapprehensions" respecting those factors. *See James v. Jacobson*, 6 F.3d 233, 242 (4th Cir. 1993).

Although Rule 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, we have previously recognized that there are three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. *See Lockheed Martin Corp.*, 116 F.3d at 112; *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Thus, the rule permits a district court to correct its own errors, "sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance. *See Russell*, 51 F.3d at 749; *Concordia College Corp v. W.R. Grace & Co.*, 999 F.2d 326, 330 (8th Cir. 1993); *FDIC v. World Univ., Inc.*, 978 F.2d 10, 16 (1st Cir. 1992); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990); *see also In re: Reese*, 91 F.3d 37, 39 (7th Cir. 1996) ("A motion under Rule 59(e) is not authorized 'to enable a party to

complete presenting his case after the court has ruled against him.'") (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)); 11 Wright et al., *Federal Practice and Procedure* § 2810.1, at 127-28 (2d ed. 1995) ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."). Similarly, if a party relies on newly discovered evidence in its Rule 59(e) motion, the party "must produce a 'legitimate justification for not presenting' the evidence during the earlier proceeding." *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996) (quoting *RGI, Inc. v. Unified Indus., Inc.*, 963 F.2d 658, 662 (4th Cir. 1992)). In general "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright et al., *supra*, § 2810.1, at 124.

In this case, the district court stated in its November 10, 1997 order granting Pacific's second Rule 59(e) motion that it was relying on the third ground for granting such a motion: to correct a clear error of law or prevent manifest injustice. According to the district court, it had clearly erred when it entered judgment in favor of American National on July 30, 1997 because at the time it denied Pacific's first Rule 59(e) motion to amend the judgment to include a monetary award and permitted American National to argue the applicability of FELA to Womack's claims, there was no motion before the court requesting such relief. The issue, then, is whether the district court abused its discretion in holding that the third basis for relief under Rule 59(e)—that the district court had committed a clear error of law or that the judgment would effect manifest injustice on the moving party—was satisfied. For two reasons, we do not believe that the district court abused its discretion.

First, as noted above, at the time the district court denied Pacific's first Rule 59(e) motion to amend the judgment in Pacific's favor to include a monetary award on the basis that American National should be permitted to argue the applicability of FELA to the Underlying Action, American National had not filed any motion requesting relief from the district court. Instead, American National had noted an appeal from the district court's judgment in Pacific's favor and took the position in its brief in opposition to Pacific's motion to amend that the appropriate forum for Pacific's arguments was this court on appeal, not the district court. While American National alternatively

argued in its opposition that it was entitled to a jury trial on the applicability of FELA to the Underlying Action, it never filed a motion requesting that relief. In granting American National relief, notwithstanding the absence of a motion, the district court, in effect, treated American National's opposition to Pacific's motion to amend as a Rule 59(e) motion to alter or amend the judgment filed by American National. Even if a district court could consider an opposition to a Rule 59(e) motion to be a formal request for relief under Rule 59(e), American National's opposition was not filed within ten days of the September 20, 1996 order of judgment in favor of Pacific and, therefore, was not timely filed for purposes of the rule. *See* Fed. R. Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.").

Second, the argument raised by American National relating to the applicability of FELA to the Underlying Action could not be appropriately considered in the context of a motion to alter or amend the judgment because it was not timely raised. As set forth above, Rule 59(e) may not be used to raise new arguments or present novel legal theories that could have been raised prior to judgment. Throughout the pendency of the action in the district court prior to judgment, American National defended Pacific's action on the basis that the Pacific Policy, in fact, afforded coverage of Womack's TRLA claims. Despite Pacific's repeated statements acknowledging that the Pacific Policy extended coverage to claims asserted under FELA, but not to any other employer liability claims, at no time prior to the district court's grant of judgment on the pleadings to Pacific on Count I of the complaint did American National assert that FELA applied to the Underlying Action. Indeed, the first time American National raised the FELA issue at all was during a hearing on a motion to clarify the district court's August 21, 1996 order granting Pacific's motion for judgment on the pleadings. Although this hearing occurred prior to the district court's September 20, 1996 dismissal of the action, it occurred after the district court entered judgment in favor of Pacific on Count I of the complaint, in which Pacific requested a declaration that the American National Policy covered the Underlying Action, not the Pacific Policy. Thus, all of the issues of coverage had effectively been resolved, as the court subsequently declared in its September 1996 order of dismissal. In addition, American National failed to file any written document containing its FELA argument until after the

district court entered final judgment in favor of Pacific on September 20, 1996.

Finally, we note that in opposing Pacific's motion to amend the judgment to include a monetary award, American National submitted and relied upon the affidavit of James Danehy, its director of commercial liability claims. In his affidavit, Danehy stated that the parties agreed in the settlement agreement that the insurance carriers could litigate all legal and factual issues concerning the insurance coverage, *including* whether FELA applied to the Underlying Action. As set forth above, however, a party may not seek to alter a previously-entered judgment by relying on new evidence, unless the party "produce[s] a 'legitimate justification for not presenting' the evidence during the earlier proceeding." *Small*, 98 F.3d at 798 (citation omitted). Since American National did not produce a "legitimate justification" for failing to submit the Danehy affidavit earlier, this evidence could not provide the basis for the district court's decision to reconsider its earlier judgment in favor of Pacific.

In light of the absence of a motion by American National requesting relief under Rule 59(e) and the overwhelming authority that a party should not be permitted to raise new arguments or legal theories of liability on a motion to alter or amend the judgment under Rule 59(e), the district court did not abuse its discretion in subsequently holding that its decision to permit American National to raise the FELA issue in the context of its opposition to Pacific's motion to amend, after all issues of coverage had been considered and decided by the district court, was clear error. Accordingly, the district court did not abuse its discretion in granting Pacific's motion to alter or amend the district court's July 30, 1997 judgment in favor of American National.[3]

[3]Because we affirm the district court's grant of Pacific's Rule 59(e) motion to alter or amend the July 30, 1997 judgment in American National's favor on the basis that the district court did not abuse its discretion in holding that it had clearly erred as a matter of law in rendering judgment in American National's favor, we need not address the district court's other justifications for granting Pacific's motion: (1) that it erred in entering judgment in favor of American National because the only relevant issue was whether Womack's claims against Rail Link, *as settled*

III.

American National also argues on appeal that the district court erred when it held, in response to Pacific's motion for judgment on the pleadings pursuant to Rule 12(c), that the Pacific Policy excluded coverage for all claims brought under the TRLA. We review a district court's decision to grant a motion for judgment on the pleadings *de novo*. *See Gutierrez v. Peters*, 111 F.3d 1364, 1368 (7th Cir. 1997); *see also Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997) ("We review *de novo* the district court's dismissal of the complaint.").

In interpreting the Pacific Policy, we begin with the language of the contract itself. Thus, "[w]here an agreement is complete on its face and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself. This is so because the writing is the repository of the final agreement of the parties."[4] *Lerner v. Gudelsky Co.*, 334 S.E.2d 579, 584 (Va. 1985); *see also Schneider v. Continental Cas. Co.*, 989 F.2d 728, 731 (4th Cir. 1993) (quoting *Lerner* and applying plain meaning rule in interpretation of insurance policy). Virginia strictly adheres to the "plain meaning" rule, entitling the parties to rely on the express terms of the written agreement. *See Lerner*, 334 S.E.2d at 584. Language in a contract is ambiguous "'when it may be understood in more than one way or when it refers to two or more things at the same time.'" *Granite State Ins. Co. v. Bottoms*, 415 S.E.2d 131, 134 (Va. 1992) (citation omitted).

As set forth above, the Pacific Policy contained an exclusion of coverage, known as Exclusion F, as follows:

This policy does not apply to:

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under the TRLA, were covered under the respective policies; and (2) that it erred in entering judgment in favor of American National because the parties did not reserve the right to litigate the FELA preemption issue in the Settlement Agreement.

[4]All parties agree that Virginia law applies to the interpretation of the insurance policies.

. . .

F. Any liability imposed on the Insured under any of the following:

1. the Employees' Retirement Income Security Act (ERISA) of 1974 as now or hereafter amended;

2. any uninsured motorists, underinsured motorists, automobile no-fault or first party personal injury law;

3. any workers compensation, employers liability (but this does not apply to the Federal Employers' Liability Act; see Employers Liability definition), occupational disease, unemployment compensation, retirement or disability benefits law or statute; or

4. any law similar to 1., 2., or 3. above.

(J.A. 49). American National argues that this exclusion is ambiguous and, therefore, must be construed against Pacific. *See Bottoms*, 415 S.E.2d at 134 (ambiguous language in an insurance policy will be construed to grant coverage, rather than withhold it). First, American National argues that subsection (4) of Exclusion F operates to include coverage of liability imposed under "any law similar" to FELA. In reaching this conclusion, American National first notes, as Pacific concedes, that subsection (3) of the exclusion specifically includes coverage of any liability imposed on Rail Link, the insured, under FELA. Because subsection (4) of the exclusion references "any law similar" to the laws denoted in subsections (1), (2), or (3), American National argues that subsection (4) has the effect of including within coverage "any law similar" to FELA. Thus, American National would exclude from the exclusion not only liability imposed on Rail Link under FELA, but also, liability imposed on Rail Link under "any law similar" to FELA.

As recognized by the district court in its August 21, 1996 opinion granting Pacific's motion for judgment on the pleadings, this interpretation of the exclusion is not plausible. The plain meaning of subsection (3) of the exclusion is that it generally excludes from coverage

any liability imposed on Rail Link under employers' liability laws. Contained within the parentheses, however, is a specific exception to this exclusion for liability imposed under FELA. Thus, subsection (3) permits coverage of liability imposed under FELA but excludes coverage for liability imposed under any other employers' liability law. Subsection (4), in referring to "any law similar to 1, 2, or 3 above," excludes from coverage liability imposed under any law that is similar to the categories of laws listed in subsections (1), (2), or (3). In arguing that this language also refers to the language in subsection (3) contained within the parentheses and, therefore, permits coverage of "any law similar" to FELA, American National ignores the fact that subsection (3) generally excludes liability imposed under employers' liability laws with the language contained within the parentheses specifically excepting from the exclusion liability imposed under FELA. To read subsection (4) as including coverage of liability imposed under any law similar to FELA renders the exception and, therefore, the parentheses denoting the exception meaningless because the effect would be to include within the coverage liability imposed under all employers' liability laws. The district court, then, was correct in holding that the plain language of this provision excludes from coverage all claims of employers' liability but specifically *includes* coverage for claims brought pursuant to FELA for bodily injury of an employee that occurs during the course of employment.

American National alternatively argues that the policy's failure to define "employers' liability," while defining "Employers' Liability," makes the exclusion ambiguous. We disagree. By defining "Employers' Liability" to refer specifically to claims for bodily injury under FELA, the Pacific Policy has defined one type of employers' liability claim and made that particular type of claim a defined term for purposes of the contract. However, its definition of one particular type of claim as a term of art does not require Pacific to define more specifically the more general category of "employers' liability" claims.

In arguing in favor of finding an ambiguity, American National relies on several Virginia cases, which hold that particular language contained in insurance policies was too ambiguous to constitute the clear exclusion required under Virginia law. These include, for example, *American Reliance Ins. Co. v. Mitchell*, 385 S.E.2d 583 (Va. 1989), in which the court held that the term "employee" was ambigu-

ous, where the insurer argued that a part-time employee constituted an "employee" for purposes of an exclusion pertaining to bodily injury to any "farm employee." *See id.* at 584, 586. Similarly, in *Caldwell v. Transportation Ins. Co.*, 364 S.E.2d 1 (Va. 1988), the court held that language in an insurance policy purporting to exclude "similar operations" to "mining" and "tunneling" was too ambiguous to permit the exclusion where both similarities and differences were earnestly argued between mining and tunneling, on the one hand, and the activity sought to be excluded, well-drilling, on the other. *See id.* at 3. Finally, in *Smith v. Allstate Ins. Co.*, 403 S.E.2d 696 (Va. 1991), the court held that the term "incidental business activity" was ambiguous and precluded an interpretation of the contract in the insurer's favor with respect to the exclusion at issue. *See id.* at 697.

These cases, however, differ from this case in that in each of the cases cited, there was particular language that was difficult to construe because it had more than one meaning in the context of the factual circumstances of the case. In this case, the plain language of the exclusion refers to a broad category of employers' liability laws and excludes any claims brought under those laws, with the exception that claims brought under one employers' liability law, FELA, are included and these claims are then specifically defined as "Employers' Liability" claims. That "employers' liability" refers to more than one type of law does not make it ambiguous as applied to this case because American National cannot contend that the TRLA does not constitute an employers' liability law, for purposes of the general category, and Pacific's definition of the more specific category as referring to FELA only renders the exclusion plain and unambiguous. Therefore, we reject American National's argument that the exclusion for all claims arising out of employers' liability laws is ambiguous and must be construed in favor of coverage. In addition, under the plain terms of the contract, we agree with the district court that the exclusion contained in the Pacific Policy excludes coverage for liability imposed under the TRLA.

IV.

In sum, we hold that the district court did not abuse its discretion in granting Pacific's Rule 59(e) motion to alter or amend the July 30, 1997 judgment rendered in favor of American National in its order of

November 10, 1997. Additionally, we hold that the district court properly held, in granting Pacific's motion for judgment on the pleadings as to Count I of the complaint, that the Pacific Policy excludes coverage for liability imposed under the TRLA. Accordingly, the district court's judgment is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed August 4, 1998

No. 96-2468
CA-96-22

Pacific Insurance Company

Plaintiff-Appellee

v.

American National Fire Insurance Company;

Defendant-Appellant

Rail Link, Incorporated

Defendant-Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court of the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Conner
CLERK

ENTERED: 11/14/97

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

FINAL AMENDED ORDER

It having been brought to the Court's attention that reference to the amount of judgment entered herein inadvertently failed to include $331.38, it is therefore ADJUDGED, ORDERED AND DECREED that said judgment entered herein under date of November 10, 1997 is AMENDED to reflect the principal amount of judgment in the amount of $1,861,331.38.

All other aspects of the Court's Order of November 10, 1997, which reflects the interest to be added shall remain in effect.

Let the Clerk send a copy of this Order to all counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

November 14, 1997

ENTERED: 11/10/97

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

FINAL ORDER

This matter is before the Court on Pacific Insurance Company to reconsider the Court's July 30, 1997 Final Order of Judgment pursuant to Fed. R. Civ. P. 59(3). For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, it is hereby ADJUDGED AND ORDERED that said motion is GRANTED, and the Court reverses its Order of July 30, 1997. Judgment is hereby ENTERED in favor of Plaintiff Pacific Insurance Company in the amount of 1.86 million dollars, all interest that has accrued between March 7, 1996 until the day of this Order in the amount of 9% per annum as allowed under Virginia law, and post judgment interest as provided by 28 U.S.C. § 1961.

This Order renders Rail Link, Inc.'s Motion To Alter Or Amend Judgment moot. American National Fire Insurance Company's Motion To Amend The Judgment is also moot. This action is hereby DISMISSED.

Let the Clerk send copies of this Order and accompanying Memorandum to counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

November 10, 1997

ENTERED: 11/10/97
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

MEMORANDUM

This matter is before the Court on the motion of Plaintiff Pacific Insurance Company ("Pacific") to reconsider the court's July 30, 1997 Final order of Judgment pursuant to Fed. R. Civ. P. 59(e). For the reasons stated below, the Court will grant Plaintiff's motion and reverse its order of July 30, 1997. Judgment will be entered in favor of plaintiff Pacific Insurance Company.

BACKGROUND

The present dispute arises from a settlement in connection with a lawsuit entitled Womack v. Rail Link, Inc. et. al CG 95141. Christopher Womack, who was seriously and permanently injured in a railroad switching accident, brought a $52 million action against his employer Rail Link, Inc. ("Rail Link"). Womack brought his action under the Texas Railroad Act, and Rail Link did not argue that the Federal Employer's Liability Act ("FELA") preempted his claim. Rail Link reported this action to its insurers, Pacific and American National Fire Insurance Company ("American National") and requested coverage under their respective

policies. Both companies disputed their obligations to Rail Link in connection with the Womack action. Pacific, whose policy expressly covers FELA claims, argued that its policy excluded coverage under the Texas Railroad Act. American National, whose policy only excludes claims under FELA, disagreed with Pacific's analysis of Pacific's policy. To cap their exposure, however, the two insurance companies agreed to settle the Womack action and each contribute $1.85 million to Womack. The two parties settled the Womack action while reserving the right to "litigate the various issues of coverage under their respective policies." April 10, 1996 Settlement Conference Transcript p-8.

Following the settlement agreement, Pacific filed its amended complaint for declaratory judgment in reference to its coverage obligations. In its August 21, 1996 Order and accompanying Memorandum, the Court granted judgment to Pacific on Count I of its Complaint, holding that Pacific's policy did not cover claims brought under the Texas Railroad Act. In its September 20, 1996 Order, the Court clarified its August 21st Order by reiterating that plaintiff's policy did not cover liability under the Texas Railroad Act, finding the remaining counts moot, and dismissing the action. Pursuant to the Court's decision that the Plaintiff is not responsible under the Texas Railroad Act for covering the Womack action, Pacific, on October 3, 1996, filed a Motion to Amend the Judgment asking that the Court specifically enter a money judgment in favor of Pacific in the amount of $1.86 million. In its December 16, 1996 Order, the Court found that liability for the Womack claim had not been resolved, denied Plaintiff's motion to amend the judgment, and ordered the parties to brief the issue of the applicability of FELA to Womack's claim.

After American National and Pacific submitted their briefs on the applicability of FELA, the Court entered an Order stating that the FELA issue was capable of being decided on the pleadings filed. (Order, April 3, 1997). On July 30, 1997 the Court entered its Final Order holding that FELA covered Womack's claims and entered judgment in favor of American National in the amount of $1.86 million.

Plaintiff now asks the Court to reconsider its July 30, 1997 Final Order of Judgment pursuant to Fed. R. Civ. P. 59(e).

DISCUSSION

The Court may, if appropriate, amend its earlier judgment under Rule 59(e) on any one of the following three grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993) (citations omitted). Plaintiff relies on the third prong of this test in bringing its Rule 59(e) motion.

A motion to reconsider must demonstrate why a court should reconsider its prior decision and "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Cover v. Wal-Mart Stores Inc., 148 F.R.D. 294, 295 (M.D. Fla. 1993). Upon reconsideration, and after argument by counsel, the Court is persuaded that the writer hereof made a clear error of law in holding as reflected in the July 30,1996 Order which will result in manifest injustice if allowed to stand. For the reasons stated below, the Court now holds that it was improper for it to have considered and decided the applicability of FELA to the

Womack claim.

A brief review of the procedural background of this case reveals the fundamental error in the Court's earlier holding. By order of August 21, 1996, the Court entered its judgment in favor of Pacific. On September 20, 1996 the Court specifically ruled that all the then remaining counts were rendered moot and dismissed the action. Consequently, the only motion before the Court was Pacific's motion to amend the judgment. Thus, the Court simply did not have before it a pleading or motion upon which relief for American National could have been granted.

Not only did the Court have no pleading or motion before it warranting a decision as to the applicability of FELA, but also, even if there had been such a pleading, the Court would have had no authority to look beyond the settlement agreement to the complaint in the underlying action. Courts have uniformly held that once an underlying action is settled, an insurer must provide coverage to the extent the settlement compromised claims that were covered by its policy. See, e.g. Zurich Ins. Co. v. Killer Music, Inc., 998 F.2d 674, 679-80 (9th Cir. 1993); Cooper Laboratories, Inc. v. International Surplus Lines Ins. Co., 802 F.2d 667, 674 (3rd Cir 1986).

Thus, the only relevant inquiry in a post-settlement coverage dispute is whether the claim as settled is covered by the policy at issue. See, e.g., Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1378 (E.D.N.Y. 1988) (insurer liable for settlement so long as settled claim would itself have been a covered loss); Public Utility Dist. No. 1 v. International Ins. Co., 881 P.2d 1020, 1032 (Wash. 1994) (insurer liable to extent underlying claims as settled were covered by the

policies); Diamond Shamrock Chemicals Co. v Aetna Cas. & Surety Co., 609A.2d 440, 478 (N.J. 1992) (insurer liable for settlement amount if claim as settled would have been covered loss). The actual merit of the underlying claim is irrelevant in a post-settlement coverage dispute. As the court in Public Utility Dist. No. 1 explained, a party "need only prove the underlying claims were covered by the policies . . . To require claims to be actually proven in an action to enforce a settlement would defeat the purpose of settlement agreements." 881 P.2d at 1032; see also, City of Idaho Falls v. Home Indem. Co, 888 P.2d 383, 389 (Idaho 1995) and Nordstrom, Inc. v. Chubb & Son, Inc., 820 F. Supp. 530, 535 (W.D. Wash. 1992) (both holding that an insurer is not entitled to re-litigate an underlying action following a settlement).

Thus, courts have uniformly held that insurers hare [sic] not entitled to re-litigate an underlying action following a settlement. Contrary to the Court's previous ruling, that rule of law was not altered by any agreement between the parties. In its December 16, 1996 Memorandum, the Court held that Pacific and American National had reserved the right to litigate the issue of whether FELA preempted the Womack claim, giving the following reasons:

> In the settlement agreement the two parties state "that they are reserving their rights against each other and agree to litigate post the settlement in the Womack case as between themselves, that they will litigate the various issues of coverage under their respective policies." Settlement Transcript p. 8. Furthermore in the August 15, 1996 hearing before this Court American National advised the Court that all issues, including FELA, had been reserved: "The other

technical issue is, I meant they [plaintiff] have to come forward and prove that this is a claim under the Texas Railroad Liability Act and that FELA does not apply to these policies." August 15, 1996 Transcript pp. 28-29.

p. 3.

The Court's factual finding in that Memorandum was erroneous; the parties had not reserved the right to litigate whether FELA preempted the Womack claim. The comment by counsel for American National during the settlement hearing that the parties "will litigate the various issues of coverage under the respective policies," quoted in the December 16th Memorandum, is ambiguous. Despite that ambiguity, however, the Court had no reason to interpret it as meaning that Pacific had agreed to litigate whether FELA applied to the underlying claim, as opposed to the interpretation consistent with the common practice and understanding of such settlement agreements.

The settlement agreement the parties entered into merely constituted an interim funding agreement. Simply stated, interim funding agreements are designed to preserve the status quo by allowing parties to pay claims without admitting that they are, in fact, obligated to do so. Under these agreements, *coverage* defenses are reserved so that after payment, the parties can still rely on their policy provisions to contest their own liability. In this way, the parties avoid the risk of a later determination that they waived their policy defenses or are estopped from asserting them due to their payment of the settlement amount. The Court needs more evidence than an ambiguous comment to determine that, despite the common understanding of the meaning of

reserving coverage defenses in a settlement agreement and overwhelming case law holding that post settlement coverage disputes examine only the claim *as settled* against the policy provisions at issue in determining coverage, Pacific nonetheless agreed to litigate the merits of the underlying claim post-settlement.

In its December 16, 1996 Memorandum, the Court bolstered its interpretation of the ambiguous statement made at the settlement hearing by American National's counsel by relying upon a later representation, also made by American National's counsel, that the FELA issue had been reserved. The Court's analysis was flawed. American National's characterization of the settlement agreement after it has been made does not change the true nature of that agreement. In fact, American National's representation to the Court on this issue was vigorously contested by Pacific immediately upon its next opportunity to address the Court:

> Just for clarity, Your Honor, this is a claim under the Texas Railroad Act. It was not filed in the Federal Employer's Liability Act. There is no issue with respect to that. This is a declaratory action... [T]he underlying case has been settled and extinguished [and] will never surface as a Federal Employer's Liability Act..."

August 15, 1996 Transcript p. 30.

In their settlement agreement, Pacific and American National reserved the right to litigate "coverage." This dispute was litigated in the declaratory judgment action before the Court in which American National had an opportunity to contend that Pacific's policy provisions are

ambiguous and should be interpreted to provide coverage for Texas Railroad Act claims. American National lost that battle. The Court should not have then allowed American National to re-characterize the settlement agreement as reserving not only coverage defenses, but also the right to re-litigate the underlying action.

The underlying action in the Womack case involved only a single count against the common insured, Rail Link, under the Texas Railroad Act. It is irrefutable that no claim was pending or was ever made against Rail Link under FELA. Thus because the settled claim was brought - and recovered pursuant to the Texas Railroad Act, American National alone is obligated to provide coverage for the settlement and must reimburse Pacific for its contribution.

CONCLUSION

Pursuant to Fed. R. Civ. P. 59(e), the Court will reverse its July 30, 1997 decision to correct clear errors of law and prevent manifest injustice. The Court erred by deciding whether FELA applied to Womack's claims because there was no motion before the Court asking it to do so. Even if the Court had had a proper motion before it, it would not have had the authority to look behind the settled claim to review the merits of the underlying claim. Because the underlying plaintiff only alleged a claim under the Texas Railroad Act, that is the only liability Rail Link faced. Accordingly, it was also the only liability American National and Pacific faced under their policies. Since Pacific's policy excludes employer liability claims like those brought under the Texas Railroad Act, it was never obligated to contribute towards the settlement of the underlying action. No agreement between the parties altered that conclusion. The

Court's erroneous determination of the nature of the settlement agreement, unsubstantiated by the record and inconsistent with the case law, creates manifest injustice by exposing Pacific to liability for a FELA claim that perhaps could have been, but never was brought against it - exposure to which Pacific appears to have had no incentive to agree.

Therefore, Court will order American National to pay Pacific $1.86 million because American National should have paid the entire amount owed to the underlying plaintiff, Womack. Because the $1.86 million constitutes liquidated damages, American National must also pay interest beginning March 7, 1996 in the amount of 9% per annum as allowed under Virginia law, as well as post-judgment interest as provided by 28 U.S.C § 1961.

An appropriate order shall issue.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

November 10, 1997

ENTERED: 7/30/97
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

FINAL ORDER

This matter is before the Court on the issue of whether W. Christopher Womack was covered by FELA when injured while performing switching operations for Rail Link. For the reasons stated in the Memorandum this day filed and deeming it just and proper so to do, judgment is hereby ENTERED in favor of American National and Rail Link, Inc. in the amount of 1.86 million dollars and against Pacific Insurance Co.

Let the clerk send copies of this Order to counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

July 30, 1997

ENTERED: 7/30/97

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

MEMORANDUM

The present dispute arises from a settlement in connection with a lawsuit entitled Womack v. Rail Link, Inc. et. al CG-95141. Christopher Womack, who was seriously and permanently injured in a railroad switching accident, brought a $52 million action against his employer Rail Link. Womack brought his action under the Texas Railroad Act and Rail Link did not argue that FELA preempted his claim. Rail Link reported this action to Pacific and to American National and requested coverage under their respective policies. Both companies disputed their obligations to Rail Link in connection with the Womack action. Pacific Insurance Company, whose policy expressly covers FELA claims, argued that its policy excluded coverage under the Texas Railroad Act. American National, whose policy only excludes claims under FELA, disagreed with Pacific's analysis of its policy. To cap their exposure, however, the two insurance companies agreed to settle the Womack action and each contribute $1,850,000.00 to Womack. Yet the two parties explicitly settled the Womack action subject to the right of recoupment from the insurance company found to be responsible for covering the action.

Following this settlement conference Pacific Insurance Company filed its amended complaint for declaratory judgment on its coverage obligations. This court found that Pacific Insurance Company's policy did not cover liability under the Texas Railroad Act. In its September 20 order, the court reaffirmed its prior ruling that plaintiff's policy did not cover liability under the Texas Railroad Act and found the remaining counts moot. Thus, under the Texas Railroad Act, plaintiff is not responsible for covering the Womack action and can seek repayment from Defendant. Pacific Insurance Company filed for judgment of 1.86 million. The Court, however, found that liability had not been resolved and ordered the parties to brief the applicability of FELA to Womack's claim.

Since the court has already held that the two parties can litigate the FELA defense, it will not address Pacific's arguments that the settlement agreement forecloses such an action. For FELA to cover Womack's claim, the Court must find that Rail Link operates as a common carrier by railroad; that it engages in interstate commerce; and that Womack's duties touch upon interstate commerce. 45 U.S.C. § 51. Rail Link operates switching operations which are not common carriers. Its wholly owned subsidiaries, however, control short line railroad systems which are common carriers. In assessing whether FELA applies to this claim or not, the main issue is whether the activities of Rail Link's subsidiaries can be imputed to Rail Link thus exposing Rail Link to FELA liability. If Rail Link and its subsidiaries are so closely connected as to render the corporate distinction meaningless, then the Court will apply FELA to see if Womack's claim falls under it.

The Court finds that the activities of Rail Link's

shortline subsidiaries can be imputed to Rail Link. Rail Link admitted that it totally controls its subsidiaries. In the requests for admissions, Rail Link admits that it owns and controls the shortline subsidiaries and that they are engaged in interstate commerce. (D.Ex 4.) Thus, while Rail Link does maintain these subsidiaries as a separate corporate entity on paper, they are in effect part of Rail Link itself. See Kieronski v. Wyandotte Terminal R. Co., 806 F.2d 107 (6th Cir. 1986).

The Court further finds persuasive evidence that Rail Link has established subsidiaries only for its shortline operations. Rail Link conducts a panoply of railroad operations but conducts solely its common carrier functions through subsidiaries. FELA expressly prohibits companies from creating subsidiaries to circumvent it. 45 U.S.C. § 55. The Court finds these shortline subsidiaries to be just that. They are Rail Link's attempts to avoid FELA.

Since the activities of its common carrier subsidiaries are imputed to Rail Link, the company meets FELA's first two requirements. Given the dictates to interpret FELA broadly, Reed v. Pa. Railroad Co., 351 U.S 502 (1956), this Court must just consider whether any part of Womack's duties affect interstate commerce. The Lubrizol plant's operations which receive products from other states and then ship them out of the state, clearly fall under interstate commerce. Thus, Womack's duties touch upon it. Therefore for the foregoing reasons the Court finds that FELA does cover the underlying claim and that Pacific Insurance Company is liable in the amount of 1.86 million.

An appropriate Order shall issue.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE
July 30, 1997

ENTERED: 4/3/97

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

ORDER

Concluding that the issue presently before the Court, i.e., whether W. Christopher Womack, was covered by FELA when injured while performing switching operations for Rail Link is capable of being decided on the pleadings filed, it is ADJUDGED AND ORDERED that pursuant to local rules, no hearing in support of or in opposition to that issue will be conducted. It is the Court's intention to conclude this case by a written opinion.

Let the Clerk send a copy of this Order to all counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

April 3, 1997

ENTERED: 12/16/96

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

ORDER

The Court is in receipt of Plaintiff's motion to amend the judgment entered on September 20, 1996. For the reasons stated in the Memorandum this day filed and deeming it just and proper so do do, it is hereby ADJUDGED and ORDERED that said motion is DENIED. The Court further ORDERS the parties to brief and argue the issue of applicability of FELA liability.

Let the Clerk send copies of this Order to counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

December 16, 1996

ENTERED: 12/16/96
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

MEMORANDUM

This matter is before the Court on the motion of Plaintiff Pacific Insurance Company, to amend the judgment entered on September 20, 1996, Plaintiff seeks judgment in its favor in the amount of $1,861,331.38 plus prejudgment interest and allowable costs.

The present dispute arises from a settlement in connection with a lawsuit entitled Womack v. Rail Link, Inc. et. al CG-95141. Christopher Womack, who was seriously and permanently injured in a railroad switching accident, brought a $52 million action against his employer Rail Link. Womack brought his action under the Texas Railroad Act and Rail Link did not argue that FELA preempted his claim. Rail Link reported this action to Pacific and to American National and requested coverage under their respective policies. Both companies disputed their obligations to Rail Link in connection with the Womack action. Pacific Insurance Company, whose policy expressly covers FELA claims argued that its policy excluded coverage under the Texas Railroad Act. American National, whose policy only excludes claims under FELA, disagreed with Pacific's analysis

of its policy. To cap their exposure however, the two insurance companies agreed to settle the Womack action and each contribute $1,850,000.00 to Womack. Yet the two parties explicitly settled the Womack action subject to the right of recoupment from the insurance company found to be responsible for covering the action.

Following this settlement conference Pacific Insurance Company filed its amended complaint for declaratory judgment on its coverage obligations. This Court found that Pacific Insurance company's policy did not cover liability under the Texas Railroad Act. In its september 20 order, the Court reaffirmed its prior ruling that plaintiff's policy did not cover liability under the Texas Railroad Act and found the remaining counts moot. Thus, under the Texas Railroad Act, plaintiff is not responsible for covering the Womack action and can seek repayment from Defendant.

Plaintiff now seeks a judgment from this Court awarding it the money it paid to Womack. If the court had fully settled the issue of liability then the money would be appropriately awarded. The court, however, has not resolved all liability issues. The court has not addressed the question of whether FELA preempts Womack's claim. If FELA does preempt Womack's claim then Defendants' policy would not cover the liability and plaintiff's policy would. In their settlement agreement, Plaintiff and Defendants agreed to reserve all coverage issues for later litigation and liability hinges on whether Womack's claim is preempted by FELA or properly brought under the Texas Railroad Act.

Plaintiff claims that Defendant is foreclosed from raising the FELA issue under the terms of the settlement agreement. After examining the language of the settlement

conference and representations of the parties made in hearings before this Court, the court finds that the two parties left all issues of coverage open. In the settlement agreement the two parties state "that they are reserving their rights against each other and agree to litigate post the settlement in the Womack case as between themselves, that they will litigate the various issues of coverage under their respective policies." settlement Transcript p 8. Furthermore in the August 15, 1996 hearing before this Court American National advised the court that all issues, including FELA, had been reserved; "The other technical issue is, I meant they [plaintiff] have to come forward and prove that this is a claim under the Texas Railroad Liability Act and that FELA does not apply to these policies." August 15, 1996 Transcript pp. 28-29.

The two parties reserved the right to litigate the issue of whether FELA preempted the Womack claim. This coverage issue must be resolved before the court can determine final liability. Therefore, the court will deny plaintiff's motion to amend the judgment and will ask the two parties to address the FELA coverage issue. An appropriate order shall issue.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

December 16, 1996

ENTERED: 9/20/96

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

ORDER

By its Order dated August 21, 1996 the Court declared that the plaintiff prevailed on Count I of the pleadings and declared that the policy in issue does not cover the asserted liability. Accordingly this resolution renders the remaining counts moot. Deeming it just and proper 50 to do, it is hereby ADJUDGED and ORDERED that this action is DISMISSED.

Let the Clerk send copies of this Order to counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

September 20, 1996

ENTERED: 8/21/96

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN
NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

ORDER

The Court is in receipt of the motion of Plaintiff Pacific Insurance Company for judgment on the pleadings as to Count I of the Complaint pursuant to Federal Rule of Civil Procedure 12(c). For the reasons stated in the Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that the motion is GRANTED.

Let the Clerk send copies of this Order and the Memorandum to counsel of record.

/S/ Robert R. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

August 21, 1996

ENTERED: 8/21/96
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

MEMORANDUM

This matter is before the Court on the motion of Plaintiff Pacific Insurance Company for judgment on the pleadings as to Count I of the Complaint pursuant to Federal Rule of Civil Procedure 12(c). A motion for judgment on the pleadings pursuant to Rule 12(c) should be granted only when no genuine issue of material fact remains, and the moving party is entitled to judgment as a matter of law. Burley v. Rada 456 F.Supp. 1095 (E.D.Va. 1978).

Count I of the Complaint seeks a declaration that the insurance policy issued by the plaintiff to Defendant Rail Link, Inc. ("Rail Link") did not cover the liability incurred by Rail Link in an action against Rail Link brought by its employee, William Christopher Womack, under the 'Texas Railroad Act" -- a Texas state statute Tex. Rev. Civ. Stat. Ann., Articles 6432-6433 [6640-6652] (Vernon 1926). Count I further seeks a declaration that the insurance policy issued by the Defendant American National Insurance Company ("American National") to Rail Link does cover this liability.

American National has conceded that its policy does

cover the liability at issue. The parties dispute, however, whether the Pacific Insurance Company policy also covers the Rail Link liability. The Pacific Insurance Company policy states, in relevant part, that "[T]his policy does not apply to:"

F. Any liability imposed on the insured under any of the following:

1. the Employees' Retirement Income Security Act (ERISA) of 1974 as now or hereafter amended;

2. any uninsured motorists, underinsured motorists, automobile or no-fault or first party personal injury law;

3. any workers compensation, employers liability (but this does not apply to the Federal Employers' Liability Act; see Employers Liability Definition), occupational disease, unemployment compensation, retirement or disability benefits law or statute, or,

4. any law similar to 1, 2, or 3. above.

Under Virginia law ambiguities in insurance policies are construed against insurers and in favor of coverage, especially when the language at issue involves an exclusion. American Reliance Ins. Co. v. Mitchell, 385 S.E.2d 583, 585 (Va. 1989). However, while "[c]ompetent legal counsel can always sake a colorable argument that language is ambiguous by proffering two meanings .... the court must examine each and decide if each plausible." Norfolk & W. Ry. v. Acc. & Cas. Ins. of Winterthur, 796 F.Supp. 929, 936 (W.D.Va. 1992).

American National has argued that the Pacific Insurance company policy applies in this case because it is ambiguous whether the exclusion at issue excludes coverage of a claim under the Railroad Act. American National argues that the phrase "any law similar" in sentence number four of paragraph F modifies the provision within parenthesis in

sentence number 3 -- "(but this does not apply to the Federal Employers' Liability Act ...)". According to American National, therefore, any law similar to the FELA, including the Texas Railroad Act, is excepted from the general exclusion of employers liability claims.

The Court finds that the interpretation suggested by American National is simply not plausible. A plain reading of Paragraph F is that it excludes from coverage any claims arising out of employers' liability laws or any similar laws with the specific exception of FELA claims, which are covered. Looking at the structure of the exclusion section as a whole makes it clear that the phrase "any law similar to 1, 2., or 3. above" modifies those laws which are excluded from coverage but not that specific law, the FELA, which is set apart in parenthesis as an exception to the general exclusion from coverage. Pacific Insurance Company is, accordingly, entitled to judgment on the pleadings as to Count I of its complaint. An appropriate order shall issue.

/S/ Robert R. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

August 21, 1996

[DISTRICT COURT DOCKET SHEET]
INTERNAL USE ONLY: Proceedings include all events.
APPEAL
3:96cv22 Pacific Insurance Co. v. Rail Link, et al. CLOSED

9/20/96 24 ORDER that by its Order dated 8/21/96 th Court declared that the pla prevailed on Count I of the pleadings and declared that the policy in issue does not cover the asserted liability. Accordingly this resolution renders the remaining counts moot. Deming it just and proper so to do, it is hereby ADJUDGED and ORDERED that his action is DISMISSED (signed by Judge Robert R. Merhige Jr.) Copies Mailed: yes (sbar)

9/20/96 -- Case closed (sbar)

9/20/96 25 MOTION by Pacific Insurance Co. for entry of judgment (sbar) [Entry date 9/23/96]

* * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. No. 3:96CV22
RAIL LINK, INC. AND AMERICAN NATIONAL FIRE INSURANCE CO.,
DEFENDANTS.

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, PACIFIC INSURANCE COMPANY, as its first Amended Complaint for Declaratory Relief against RAIL LINK, INC. and AMERICAN NATIONAL FIRE INSURANCE COMPANY states as follows:

JURISDICTION AND VENUE

1. Pacific Insurance Company ("Pacific") is a California corporation with its principal place of business in Chicago, Illinois.

* * *

20. On February 15, 1996, a settlement was reached in the Underlying Action. Pursuant to the terms of this settlement, Pacific, American National and others will contribute funds. The funds contributed by Pacific and American National on behalf of Rail Link are being paid solely in the interest of concluding the Underlying Action, and the parties involved have not admitted, agreed to or made any representations or commitments whatsoever as to any or all coverage obligations of Pacific and/or American National.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. Civil Action No. 3:96cv22
RAIL LINK, INC., et al.
DEFENDANTS.

DEFENDANT AMERICAN NATIONAL FIRE INSURANCE COMPANY'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF

Defendant American National Fire Insurance Company ("American National") for its Answer to Plaintiff's First Amended Complaint for Declaratory Relief states as follows:

1. American National admits the allegations in paragraph numbered one.

2. American National admits the allegations in paragraph numbered two.

3. American National admits the allegations in paragraph numbered three.

4. American National admits the allegations in paragraph numbered four.

* * *

38. The American National policy provides no coverage to Rail Link for the claims in the Underlying Action.

39. The Pacific policy provides coverage to Rail Link for the claim in the Underlying Action. The settlement of such claim is within the applicable Pacific policy limits.

40. Pacific's policy does not exclude coverage for

the claim in the Underlying Action.

41. In the alternative and to the extent it is determined that the American National policy provides coverage for the Underlying Action, Pacific's policy also provides coverage and underlies the American National policy in priority ahead of American National's coverage which would be excess coverage above Pacific's coverage. The settlement of such claim is within the applicable Pacific policy limits and American National is not obligated to pay any portion of any judgment or settlement or to indemnify Rail Link for the claims in the Underlying Action.

42. Pacific is estopped to deny coverage for the claim in the Underlying Action.

43. The American National policy does not provide coverage for the claims in the Underlying Action in that the claim in the Underlying Action is not an employer liability claim and/or is not a claim cognizable under the Texas Railroad Act.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. Civil Action No. 3:96cv22
RAIL LINK, INC., et al.
DEFENDANTS.

DEFENDANT AMERICAN NATIONAL FIRE INSURANCE COMPANY'S COUNTERCLAIM AND CROSS-CLAIM FOR DECLARATORY RELIEF

Comes now defendant American National Fire Insurance Company, ("American National"), by counsel, and as and for its Counterclaim against the Plaintiff and Cross-Claim against defendant Rail Link, Inc. for Declaratory Relief respectfully states as follows:

* * *

COUNT III

20. American National realleges and repleads the allegations contained in paragraphs numbered one through eleven as if fully set forth herein.

21. American National affords no coverage in connection with the Underlying Action because the claims in the Underlying Action are not claims cognizable under the Texas Railroad Act and therefore are not covered under the American National policy.

22. American National is not obligated to pay any portion of any judgment or settlement or to indemnify Rail Link for the claims in the Underlying Action because the claims in the Underlying Action are not claims cognizable under the Texas Railroad Act.

23. There exists an actual controversy between American National and the other parties within the jurisdiction of this Court and involving the rights, obligations, liabilities, and legal relations under the American National policy and under the Pacific policy which controversy must be determined by a judgment of this Court, without other suits.

* * *

[IDENTITY: FEBRUARY 15, 1996
SETTLEMENT CONFERENCE BEFORE THE
HONORABLE ROBERT E. PAYNE,
TRANSCRIPT PP. 8-9]

* * *

THE COURT: Do you want to recite the arrangement between the insurance companies?

* * *

[MR. BARONIAN] The payments by Pacific and American National Fire Insurance Company are made with the understanding and agreement between them that Pacific and American National agree that they are reserving their rights against each other and agree to litigate post the settlement in the Womack case as between themselves, that they will litigate the various issues of coverage under their respective policies.

Secondly, they agree that with respect to the applicability of exclusion under Pacific's policy, that issue would be preserved, and if determined that that exclusion applies to Rail Link, Inc. for coverage for the Womack action in settlement, American National will be obligated to reimburse Pacific.

Thirdly, the above-stated stipulation with regard to the exclusion would not apply if somehow American National was determined not to owe coverage to Rail Link for the Womack action in settlement.

In the event that Pacific and American National were determined to both provide coverage to Rail Link for the Womack action and settlement, the issue of priority as between their coverage is agreed to be decided and agreed to effect a reimbursement to carry out the final judicial determination of that issue.

* * *

[IDENTITY: AUGUST 15, 1996 HEARING
BEFORE THE HONORABLE ROBERT R. MERHIGE, JR.
TRANSCRIPT, PP. 27-28]

* * *

THE COURT: Let me ask you, because I have just concentrated on the issue before me -- doesn't this, regardless of how the Court may rule, doesn't this end the case?
MR. SHEWMAKE: No. For two reasons. I mean to the extent --
THE COURT: I mean, we are dealing with count one, I realize that, but I didn't pay attention to the other because I didn't think it was material to what we were trying to decide.
MR. SHEWMAKE: It doesn't end it to the extent that if you find that the Pacific Insurance policy applies, then you have the other insurance. And looking at the various policies of who has -- who is applicable. So that wouldn't end it.
THE COURT: I am trying to find out what issues would be left.
MR. SHEWMAKE: The other technical issue is, I mean, they have to come forward and prove that this is a claim under the Texas Railroad Liability Act and that FELA does not apply to these policies. I mean, the Court --

* * *

[IDENTITY: SEPTEMBER 13, 1996 HEARING
BEFORE THE HONORABLE ROBERT R. MERHIGE, JR.
TRANSCRIPT PP. 40-46, 49-50]

* * *

MR. SHEWMAKE: May I begin, Mr. Carey? This is where we are, Your Honor. In terms of the ruling, this was a motion for judgment on the pleadings. This is a declaratory judgment. We were under the impression that we were going forward on the motion for the judgment on the pleadings.

THE COURT: But it was motion for judgment on the pleadings as to count one.

MR. SHEWMAKE: Yes, Your Honor. And the issue is, and our position was, and wanted clarification, was Your Honor ruling that if they prove the underlying facts that the Texas Railroad Act applied? Is The Court, The Court obviously declared if it is the Texas Railroad Act claim, their policy does not apply, and ours does apply. The issue is, do they have to prove the underlying cognizable claim, and, for example, one thing I mentioned in the hearing is one of the issues would be, was this really a FELA case? I can make a short proffer to the Court what I thought the facts would be on that.

Rail Link has a number of subsidiaries, and they do short line, which is clearly covered by FELA. And then we had this plant where the accident occurred, which is clearly a switching plant. And if this were only, the only plant that Rail Link had, by affiliation or otherwise, FELA would not apply. But in this case they have a number of other what is known as short line railroads that FELA does apply What they have done is set up subsidiaries for each of the individual short lines that have FELA. We believe an attempt to shield them from FELA generally, although Rail Link is a named insured on each of those. The Fourth Circuit, for example, has held in a case of

Southern Railroad versus Crosby, 201 F.2d 878, that an employee of one of the subsidiaries that is controlled wholly, and only by the parent, can sue the parent under FELA. And in this case you have someone who was actually an employee of the parent company. And our position would be if the court were to find factually that the employees who do railroad work and the subsidiaries could sue Rail Link under FELA, then anybody who is employed by Rail Link can be sued under FELA assuming it meets the other, touching interstate commerce and so forth. There are a list of cases that say a switchman, which Mr. Womack was, would be covered in that even though he wasn't personally doing the common carrier work. That is a tactual issue that we believe, for example, that would need to be proved, that there would have to be evidence adduced on. We understand Your Honor's ruling, if the court or the jury finds that FELA does not apply and that the Railroad Act in fact did cover this, then we understand Your Court's ruling and that greatly reduces the triable issues. But that is one of the things that we need clarification. Was Your Honor simply ruling that they win totally as to count one, because if they win totally as to count one, regardless of the facts, that doesn't affect or dispose of the other counts that remain in the case.

MR. CAREY: Scott Carey, Judge.

THE COURT: Yes.

MR. CAREY: In short order really our complaint is two counts. The second count was basically an alternative count, in the event there was concurrent coverage under both policies, a back drop kind of secondary issue would be whether one policy was primary, or the other was excess, and so on. That count is essentially rendered moot by Your Honor's ruling under count one, which does in fact hold that the American National policy responds, the Pacific policy does not. While I could probably take issue with Mr.

Shewmake's characterization of the law with respect to FELA and so on, our position is that whether or not there are any factual issues as to whether this individual was an employee of a railroad engaged in interstate commerce, that is no longer a relevant issue. That ship has sailed. As a legal matter, the underlying complaint is not a dynamic type of law suit that is still out there, and still can be amended. It was settled. It is clear on its face. I think the law in Virginia and elsewhere, and if we have to brief this certainly we will, but the indemnity obligations are determined by the four corners of the underlying complaint and this complaint was simply a Texas Railroad Act case. Whether it was viable, I mean as an aside, experienced trial and railroad defense lawyers in Texas opined to Rail Link, Brenco, and all of the excess insurers over a course of several months that it was a viable action under the Texas Railroad Act and was not viable under FELA. But you know that those are opinions, those are things that would come in if this was a hypothetical type of situation, but the underlying case was solely pled against Rail Link, the common insured under the Texas Railroad Act. And The Court has ruled properly. So that the Texas Railroad Act triggers coverage under American National and not Pacific. So our position is, you know, without being redundant, that ship has sailed, and your ruling is dispositive of the entire case, and as Pacific is entitled to not just declaratory relief, but a monetary judgment in the amount of the funds that it advanced on the interim basis and agreement with American National.

MR. SHEWMAKE: May I reply? Your Honor, I think what Mr. Carey is saying is neglecting what the settlement agreement is, because ultimately this is basically a contract dispute outlined by the parameters of the settlement agreement. If you look at page 5 of their agreement, and we came in with Judge Payne and hammered it out, all the parties

said this prejudices absolutely nothing. Everything is absolutely fair game to litigate to see if there would be coverage, would not have been coverage. He identified that in page 5 of his opening brief. In court Mr. Carey emphasized that everything was open. That is one reason why whoever wins can get the 1.85 million back. The parties were simply getting rid of the underlying case while preserving all rights and status. We wanted to basically knock down the field. Know that we are not talking about 52 million, we are talking about roughly four million dollars. That was the purpose of the settlement.

And those are the terms by which it is judged. So the question is, did the settlement agreement when both parties ponied up the 1.85 million dollars, did that prejudice any other claims and defenses to coverage that we could have? Page 5 of the brief clearly says there was no prejudice to any coverage. That is true. That was our understanding. That is the basis upon which we put the 1.85 million up. What Mr. Carey is saying is, no, what it does is you put up the 1.85, and then that prejudices your claim. That it is not a cognizable Railroad Act, the FELA does not apply, and therefore we get you to reimburse us 1.85 million. That was not American National's intention and agreement when it agreed to put it in. It agreed to put the money in subject to, can we litigate all --

COURT: That is another issue, isn't it?

MR. SHEWMAKE: That is one of the factual issues that would have to be proved. That is one of our points. I think Your Honor has declared, and will greatly limit the scope.

COURT: I declared that the count one, that whatever is said in count one, I don't have it in front of me, Pacific is entitled to judgment on everything that was pled in count one. That is it. Now, look at count one. If count one was the only thing there, you could use that. That would be it. No argument

about it.

MR. CAREY: Well, it strikes me, Your Honor, that we are at odds as to whether the disposition of count one as The Court has handled it does in fact dispose of it.

THE COURT: But I think that is another issue.

MR. SHEWMAKE: I guess our problem is this was an equitable action, so they were alleging in count, one various facts and asking for various declarations. I guess our position was Your Honor, declaration was as to granting on count one that you declare that their policy does not cover Texas Railroad Act claims, that our policy does cover Railroad Act Claims. Then the factual issue remains for trial, given that judgment on the pleadings as to count one, is this a Railroad Act claim or not? If it is based on Your Honor's ruling they get the 1.85 million. If it is not, they don't. I mean, that was our interpretation of your judgment on the pleadings.

* * *

THE COURT: How should we handle this so we can close it or not?

MR. CAREY: My suggestion would be we go ahead and file our motion for what we believe the entry of judgment should be, and our basis for it, and that Mr. Shewmate [sic] given reasonable time to respond. And then frankly, Your Honor. you have by my recollection the 27th blocked out for trial. Maybe we would want to argue motion on that.

THE COURT: Let me look. That may have long gone.

MR. CAREY: We could have the motion filed in three or four business days.

THE COURT: Yes, that is fine. Yes. I can do it as scheduled. I will leave the 27th as is. I think we probably had a 9:30 time, didn't we?

MR. SHEWMAKE: I believe so.

THE COURT: I didn't put the time down. Make it 9:30.

* * *

MR. CAREY: Judge, so that we could formalize from a scheduling standpoint, we will have our motion filed with the Court by next Thursday.
THE COURT: Which will be about the 19th? Yes.
MR. CAREY: Yes, sir.
THE COURT: How long are you going to need?
MR. SHEWMAKE: I can get ours in, if they have four business days, we can get ours in within four business days.
THE COURT: Well, the 25th, that gives me two day too, but they may want to respond to your --
MR. CAREY: Your Honor, I think we beat this horse enough, as much as I hate to give it up. I will waive a reply.
THE COURT: Good. All right. I will hear the argument on this on the 27th.
MR. CAREY: 9:30.
THE COURT: At 9:30.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. Civil Action No. 3:96cv22
RAIL LINK, INC., et al.
DEFENDANTS.

PACIFIC INSURANCE COMPANY'S MOTION TO AMEND JUDGMENT

Plaintiff, PACIFIC INSURANCE COMPANY ("Pacific"), pursuant to Federal Rule Civil Procedure 59, requests that this Court Amend the Judgment entered on September 20, 1996 and grant Pacific judgment in its favor in the amount of $1,861,331.38, plus prejudgment interest and allowable costs. In support thereof, Pacific submits a memorandum of law, a copy of which is attached hereto and incorporated herein by reference.

PACIFIC INSURANCE COMPANY

By: /S/
Its Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion to Amend Judgment, and Memorandum of Law in Support of Motion to Amend Judgment, was hand delivered, this 3 October, 1996 to the following:

Samuel Baronian, Jr., Esquire
Shewmake, Baronian & Parkinson
5413 Patterson Avenue, Suite 101
Richmond, Virginia 23226

Gary J. Spahn, Esquire
Mays & Valentine
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/S/

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. Civil Action No. 3:96cv22
RAIL LINK, INC., et al.
DEFENDANTS.

AMERICAN NATIONAL FIRE INSURANCE COMPANY'S MEMORANDUM IN OPPOSITION TO PACIFIC INSURANCE COMPANY'S MOTION TO AMEND THE JUDGMENT

Preliminary Statement

This Court ordered Pacific Insurance Company ("Pacific") to file a brief by September 19, 1996 setting forth the relief Pacific was requesting and whether Pacific must prove that the Federal Employer's Liability Act ("FELA") did not apply to the underlying personal injury action. American National Fire Insurance Company ("American National"), in turn, was ordered to file a responsive brief by September 25, 1996 opposing Pacific's motion. Argument was set for September 27, 1996 - the day the case was set for trial.

In direct violation of the Court's order, Pacific failed to file its brief by September 19, 1996. As a result, by order dated September 20, 1996, the Court limited its previous ruling to the asserted liability under the Texas Railroad Liability Act, and then dismissed the action. Pacific's failure to file a brief on time effectively precluded American National from setting forth in detail why FELA preempted the

underlying claim and why Pacific owed American National money.

Without offering any excuse or justification for failing to file its brief on time, Pacific now requests that the Court grant Pacific a 1.86 million dollar judgment - a judgment never requested in Pacific's Amended Complaint or even in its Motion for Judgment on the Pleadings. By its actions, Pacific seeks to circumvent having to prove that FELA did not apply to Womack's claim and tries to suggest that Pacific's failure to previously request 1.86 million dollars was an oversight.

By failing to file its brief, Pacific can not contest that FELA preempted Womack's claim. Pacific, therefore, is not entitled to a 1.86 million dollar judgment. This is especially true when Pacific never requested such relief before judgment was entered. Courts grant relief under Rule 59(e) only in the most extraordinary circumstances. Pacific has set forth no facts to justify why it is entitled to a huge judgment after entry of the final order, and it has failed to cite a single case which even discusses Rule 59(e), much less one that justifies a substantial money judgment after the fact.

Pacific cannot by its own neglect preclude argument, evidence, and a trial on whether FELA applies, and then claim it is entitled to a money judgment - acting as if the FELA issue never existed. When Pacific failed to file a brief, the Court assumed Pacific was content to limit the declaratory ruling to the issue of whether Pacific's policy would cover a Texas Railroad Act claim. Pacific cannot circumvent the Court's Order and prejudice American National by seeking a money judgment after the case has been disposed of.

FACTS

As the Court is aware, Christopher Womack brought a $52 million action against Rail Link, Inc., who was insured by American National, Pacific, and Hartford. Because Hartford had asserted primary coverage and American National was only a pure excess carrier, American National found itself in a quandary. American National had strong reservations concerning how the underlying defense was being handled. American National also recognized that Rail Link had no incentive to assert that FELA preempted Womack's Texas Railroad Act claim. If Rail Link asserted FELA as a defense, then Womack could simply seek a recovery under FELA and expose Rail Link's national operation to numerous FELA claims - a much larger threat than a sparsely used state statute. In other words, although the FELA preemption defense would benefit American National because its policy excluded FELA claims and Pacific's policy expressly covered such claims, American National knew Rail Link would never assert FELA as a defense in the underlying Womack suit.

American National therefore agreed with Pacific to contribute to an underlying settlement to dispose of the Womack matter only if American National could litigate in the declaratory judgment action any and all factual and legal issues pertaining to coverage. This absolute non-waiver agreement was a material provision to American National and formed the bedrock of its consideration in agreeing to partially fund the Womack settlement. (See Exhibit A - James S. Danehy Affidavit).

Pacific initially acknowledged that all coverage issues were being reserved. After the underlying settlement, Pacific

amended its Motion for Declaratory Judgment to reflect this express and complete reservation:

> 20. On February 15, 1996, a settlement was reached in the Underlying Action. Pursuant to the terms of this settlement, Pacific, American National and others will contribute funds. The funds contributed by Pacific and American National on behalf of Rail link are being paid solely in the interest of concluding the Underlying Action, and the parties involved have not admitted, agreed to or made any representations or commitments whatsoever as to any or all coverage obligations of Pacific and/or American National.

Plaintiff's First Amended Complaint for Declaratory Relief (emphasis added).

Indeed, Pacific's counsel in subsequent argument acknowledged that the parties had reserved all issues relating to coverage and that no coverage defenses had been waived by the underlying settlement:

> And the parties took advantage of that opportunity . . . to resolve the underlying case on what was reasonable grounds, and then proceed on completely, non-waiver arrangement . . . .

August 15, 1996 Transcript at p. 5.

Moreover, in response to the Court's own inquiries at the August 15, 1995 hearing, American National advised the Court that all issues, including FELA, had been reserved:

> The Court: I am trying to find out what issues would be left [if Pacific's motion were granted].
> Mr. Shewmake: The other technical issue is, I mean they have to come forward and prove that this is a claim under the Texas Railroad Liability Act and that FELA does not apply to these policies.
>
> * * *
>
> The [Womack] case was settled short of trial. . . Mr. Carey is correct, we agreed to pay the money [to Womack] and reserve all rights, defenses and arguments as it relates to whether it was a cognizable claim.
>
> * * *
>
> So I mean that [FELA and other coverage defenses] technically that is not before the Court. . . . The issue [currently before the Court], is, does the Texas Railroad Liability Act, is that covered by the Pacific policy and the American National policy?

August 15, 1996 Transcript pp. 28-29.

In light of the Court's ruling that Pacific's policy excluded the Texas Railroad Act, Pacific subsequently tried to argue that American National was somehow precluded from arguing that FELA preempted the underlying action. That dispute led to the Court conference on September 13, 1996.

At that conference, the parties presented the dispute to the Court. American National expressly proffered, inter alia, that FELA preempted the Womack claim and that before

any sort of affirmative relief for either party could be granted, evidence was necessary on the FELA issue. Pacific advised the Court it was filing a motion setting forth any relief it was requesting. After listening to the parties, the Court ordered Pacific to file its motion as well as its brief on the FELA issue by September 19, 1996. The Court ordered American National to respond to Pacific's brief by September 25, 1996. The hearing was set for September 27, 1996, the day the case had been set for trial.

Pacific missed its deadline and failed to file its brief by September 19, 1996. Because Pacific had never requested money damages and because Pacific did not brief the FELA issue, on September 20, 1996, the Court dismissed this action. Given Pacific's failure to file a brief, the Court limited its ruling to the Texas Railroad Act issue. On October 3, 1996 - thirteen days later - Pacific moved to amend the judgment, to the tune of 1.86 million dollars. Pacific neither acknowledges its violation of the Court's Order, nor provides any excuse for the violation.[5]

ARGUMENT

I. Having violated the Court's Order and having prejudiced American National, Pacific is not entitled to 1.86 million dollars under Rule 59(e). Pacific has not cited a single case that discusses Rule 59(e), much less one that

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[5] Under Rule 59(e), a party must file a motion to amend the judgment within ten days of the judgment's entry. Pacific appears to assume that Rule 6(a) allows Pacific to file thirteen days later. American National is unaware if the Fourth Circuit has held whether Rule 6(a) serves to modify the filing requirement of Rule 59(e).

supports Pacific's position.

Relief under Rule 59(e) is rarely granted and requires extraordinary circumstances to justify the relief. Such extraordinary relief can only be granted if one of the following conditions are satisfied:

1. To accommodate an intervening change in controlling law;
2. To account for new evidence not available at trial; or
3. To correct a clear error of law or prevent manifest injustice.

Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993).

Clearly, the first two prongs do not apply. Nor is there any error of law; Pacific never requested monetary relief before judgment was entered. Pacific is therefore reduced to arguing that a manifest injustice would result if the Court's final order stands. Pacific's argument should be rejected for several reasons.

Manifest injustice would not result vis a vis Pacific. It was Pacific that failed to request a money judgment, and it was Pacific that decided to violate the Court's Order to file a brief by September 19, 1996. The situation is analogous to a plaintiff who has allowed a statute of limitations to run. An injustice does not result. Damage, if any, is attributable to the plaintiff himself, and any redress from the situation should not be addressed to the defendant. Rule 59(e) is not intended to allow plaintiffs to raise new arguments or theories they could have and should have raised before judgment was entered. L.B. Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263 (7th Cir. 1995). See also, Lynch v. Cannatella, 122 F.R.D. 195 (E.D. La. 1987), affm'd, 860 F.2d 651 (5th Cir. 1988)(Rule 59(e) motion denied; judgment was justified

because counsel failed to comply with court orders).

Consistent with that principle, courts have uniformly held that a plaintiff is not entitled to a money judgment under Rule 59(e) if it did not request that relief before judgment is entered. L.B. Credit, supra; Harley-Davidson Motor Co. v. Bank of New England - Old Colony, N.A., 897 F.2d 611 (1st Cir. 1990); See e.g., Boryan v. United States, 884 F.2d 767 (4th Cir. 1989). Pacific has failed to cite a single case in which a court has granted the plaintiff money damages under Rule 59(e) that were never requested by the plaintiff before entry of judgment.

In an attempt to justify receiving 1.86 million dollars after final judgment was entered, Pacific relies heavily on cases construing Rule 54, not Rule 59. Two problems exist with Pacific's authority. Rule 54 involves a different standard of review because the issue involves a prejudgment decision. In effect, because Pacific never asked for a money judgment prior to the final order, it must satisfy the requirements of Rules 54 and 59. In addition, the Rule 54 cases cited by Pacific do not stand for the principle Pacific espouses, even by analogy. For example, Pacific incorrectly cites Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983) as holding that the trial court erred in refusing to grant damages that were not requested by the plaintiff. Atlantic Purchasers stands for the exact opposite proposition. The Fourth Circuit in Atlantic Purchasers upheld the trial court's decision to deny the plaintiff's Rule 54 motion.

Moreover, Pacific argues that it is entitled to a judgment because of an agreement between Pacific and American National. But it is that same agreement upon which a dispute exists, and which Pacific sought to avoid

when it argued American National could not raise the FELA issue. American National has steadfastly maintained that the oral agreement between the parties allowed the parties to litigate any and all coverage defenses - including whether FELA applied. Indeed, because Pacific pled that all coverage issues were reserved and could be litigated, American National's position is the law of the case. American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988).

Pacific now seeks post-judgment relief under Rule 59(e), citing the parties' agreement while still presumably arguing that American National cannot raise the FELA issue. Pacific cannot have it both ways. If Pacific belatedly relies upon an agreement between the parties, it must prove all the material terms of the agreement and must prove that it is entitled to relief under the agreement. That agreement included a provision that American National could litigate all coverage issues, including FELA.[6]

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[6] In its brief, Pacific quotes selected portions of a settlement transcript. After citing the agreement to reserve all coverage issues, Pacific then quotes an excerpt in which American National states it would be obligated to reimburse Pacific if Pacific's policy exclusion applied. Pacific neglects to mention the very next unqualified statement:

> Thirdly, the above-stated stipulation with regard to the [Pacific] exclusion would not apply if somehow American National was determined not to owe coverage to Rail Link for the Womack action in settlement.

February 15, 1996 Transcript p. 9.

(continued...)

Consequently, Pacific was required to prove that FELA was not a defense to the Womack claim. In essence, this Court did not consider the exact terms and parameters of the agreement between the parties precisely because Pacific failed to file its brief on time. Pacific therefore cannot, out of context, selectively choose terms of the agreement to support a claim for money damages. There has never been a trial or hearing on any coverage issue other than on whether Pacific's policy covers the Texas Railroad Act. There has never been a trial on whether FELA factually preempted the Womack claim or whether it applied. Without such a trial, Pacific cannot claim money damages, irrespective of the untimely nature of the request.

Pacific has never seriously contested that FELA was a defense to the underlying claim. It instead has argued (in the brief it filed late), that settling the underlying action precluded American National from raising the FELA issue. The cases cited by Pacific are inapposite. None of the cases involved an express agreement between the parties that any and all insurance coverage issues and defenses could be asserted notwithstanding the settlement. Parties can always modify

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[6](...continued)

If FELA preempted the underlying claim, then Pacific would cover the claim and American National would not afford coverage. Thus, American National's recitation, agreed to by Pacific, made clear that American National could litigate all coverage issues including FELA. The agreement between Pacific and American National was designed to reserve all issues (including those defenses Rail Link would not have raised) while ensuring that the parties would not be considered legal volunteers in funding the settlement.

their legal duties, rights, and obligations by contract - which is exactly what the parties did in this case. Rash v. Hilb, Rogal and Hamilton Co. of Richmond, 251 Va. 281, 467 S.E.2d 791 (1996).

Further, the cases cited by Pacific only involved whether an insurer, without an agreement with its insured, could recover a portion of the settlement from its insured based on the potential claims the underlying plaintiff did not assert. In contrast, the issue in this case is whether Rail Link had a FELA defense to the Texas Railroad Act, (which in turn would have forced Womack to assert a FELA claim). In other words, this case involves whether American National, by agreement, had a right to litigate a factual and legal defense that affected whose policy, if any, covered the underlying claim.

Further, American National would note that the ability to pursue the FELA defense was a material part of its agreement with Pacific. If for some reason the agreement to reserve all issues were not legally enforceable, then American National's consideration will have failed and the entire agreement - including the provision upon which Pacific now relies - would be invalid and unenforceable against American National. Alston Studios, Inc. v. Lloyd V. Gress & Assocs., 492 F.2d 279 (4th Cir. 1974).

II. American National bargained to preserve the FELA issue because it recognized the potential validity of the defense.

If a trial had been conducted in this matter, American National would have adduced evidence that Rail Link was a common carrier by railroad; that it operated a number of

shortline railroads covered by FELA; and that Rail Link formed wholly owned and controlled subsidiaries for each of its shortline railroads in an attempt to avoid FELA exposure to its inplant switching operations. (See Exhibits B-E). In fact, the president of Rail Link, James Benz, is also the president and director of the Rail Link controlled subsidiaries. (See Exhibit F). Although not legally required to do so, American National made the proffer because it wanted to assure the Court that American National was not merely posing a procedural defense.[7]

The Fourth Circuit has expressly held that the operations of a wholly owned and controlled subsidiary are attributable to the parent corporation under FELA. Southern Ry. Co. v. Crosby, 201 F.2d 878 (4th Cir. 1953). See also Eddings v. Collins Pine Co., 140 F. Supp. 622 (N.D. Cal. 1956)(lumber company is a common carrier for FELA purposes if its subsidiary is a common carrier); Lone Star Steel Co. v. McGee, 380 F.2d 640 (5th Cir.), cert. denied, 389 U.S. 977 (1967).[8]

---

[7] Because American National is only responding to Pacific's Motion to Amend the Judgment, American National is not inundating the Court with evidence concerning FELA. Rather, American National is simply providing the Court with sufficient information to demonstrate that the applicability of FELA was a material factual issue that Pacific needed to address.

[8] The Crosby analysis has been further reinforced by the Supreme Court decision in Copperweld Corp. v. Independence Tube, 467 U.S. 752 (1984). In Copperweld, the Court held that for purposes of antitrust law, the actions

(continued...)

In addition, it is beyond cavil that if FELA applies to a company, then FELA also covers the company's employees who conduct switching operations, even though the switching employees are not performing work that would normally be covered by FELA. If a company conducts railroad operations under FELA, then all its employees who engage in work touching interstate commerce are covered by FELA. Peresipka v. Elgin, Joliet and Easter Ry. Co., 217 F.2d 182 (7th Cir. 1954); Ericksen v. Southern Pacific Co., 246 P.2d 642 (Cal.), cert. denied, 344 U.S. 897 (1952); Pritt v. West Va. Northern R. Co., 51 S.E.2d 105 (W. Va. 1948), cert. denied, 336 U.S. 961 (1949); Coal & Coke Ry. Co. v. Deal, 231 F. 604 (4th Cir. 1916). This includes switching operations. Id.; Lewis v. Industrial Accident Commission, 120 P.2d 886 (Cal. 1942). Thus, because Rail Link is a common carrier through its shortline activities, Womack was covered by FELA at the time of his injury, even though he was conducting a switching operation when he was injured.[9]

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[8](...continued)
of a subsidiary must be attributed to the parent. A court should look to economic reality in determining whether a plurality of actors exist or whether the corporate entities should be considered one actor. In this case, Rail Link's wholly owned and controlled subsidiaries are for all intents and purposes one and the same with Rail Link.

[9] In its untimely brief filed on September 20, 1996, Pacific never discussed the Crosby or Eddings case. It instead only cited one case which stands for the well known proposition that a pure inplant switching operation does not by itself transform a company into a common carrier. Kieronski v. Wyandotte Terminal R. Co., 806 F.2d 107 (6th

(continued...)

But because Pacific did not file its brief, the Court dismissed this action. American National was greatly prejudiced by Pacific's failure. If FELA applies, American National would have had more than just a defense to any claim by Pacific. American National would have been entitled to money damages because FELA is expressly covered by Pacific's policy and expressly excluded under American National's policy. It would constitute a gross injustice to allow Pacific to escape the FELA issue by its own misconduct and then award Pacific 1.86 million dollars as if the FELA issue never existed.

CONCLUSION

When Pacific failed to file its brief, the Court took action based on the record and pleadings before it. While American National obviously does not agree with the Court's Final Order, it certainly understands the Order and the basis for it. Pacific should not be allowed to miss deadlines, circumvent a trial, and then receive a 1.86 million dollar judgment. Granting such relief would serve to further prejudice American National, and Pacific cannot cite any case or principled reason why it should be granted such

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[9](...continued)
Cir. 1986). However, because Rail Link is a common carrier by virtue of its shortline railroads, the question is no longer whether the particular switching operation at issue was itself a common carrier. Because Rail Link operates shortline railroads, the only remaining issue would be whether Womack's job touched upon interstate commerce. Receiving and preparing to ship huge amounts of Lubrizol's international product clearly touches upon interstate commerce.

extraordinary relief.

The September 20, 1996 ruling clarified the Court's Order of August 21, 1996. Pacific is not entitled to yet another Order of Reclarification. The Court has issued its Final Order. To the extent Pacific or American National is aggrieved, the proper course is an appeal.

WHEREFORE, American National asks that Pacific's Motion to Amend the Judgment be denied or that, in the alternative, that a trial on the merits, including on the issue and applicability of FELA, be had.

AMERICAN NATIONAL
FIRE INSURANCE
COMPANY

By /S/

Counsel

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Samuel Baronian, Jr. (VSB No. 21651)
SHEWMAKE, BARONIAN & PARKINSON
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P.O. Box 17675
Richmond, Virginia 23226
(804) 288-9030

CERTIFICATE

I hereby certify that on this 15th day of October,

1996, a true copy of the foregoing was hand-delivered to John H. OBrion, Esquire, Cowan & Owen, P.C., 1930 Huguenot Road, Richmond, Virginia, 23235, counsel for plaintiff, faxed and mailed postage prepaid to Scott L. Carey, Esquire, Bates, Meckler, Bulger & Tilson, 8300 Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606, counsel for the plaintiff, and hand delivered to Gary J. Spahn, Esquire, Mays & Valentine, 1111 E. Main Street, Richmond, Virginia, 23219, counsel for defendant Rail Link, Inc.

/S/

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

PACIFIC INSURANCE COMPANY,
PLAINTIFF,

v. Civil Action No. 3:96cv22

RAIL LINK, INC., et al.
DEFENDANTS.

DEFENDANT RAIL LINK, INC.'S RESPONSES TO DEFENDANT AMERICAN NATIONAL FIRE INSURANCE COMPANY'S REQUESTS FOR ADMISSION

Defendant Rail Link, Inc., by counsel, for its responses to Defendant American National Fire Insurance Company Requests for Admission, states as follows:

* * *

6. Admit that at all times relevant hereto, Commonwealth Railway, Incorporated and Carolina Coastal Railway, Inc. were wholly owned subsidiaries of Rail Link, Inc.

RESPONSE: Admitted.

7. Admit that at all times relevant hereto, Rail Link, Inc. controlled Commonwealth Railway, Incorporated and Carolina Coastal Railway, Inc.

RESPONSE: Admitted.

* * *

9. Admit that at all times relevant hereto, James W. Benz was the president of Rail Link, Inc.

RESPONSE: Admitted.

10. Admit that at all times relevant hereto, James W. Benz was the president and director of Commonwealth

Railway, Incorporated and Carolina Coastal Railway, Inc.

RESPONSE: Admitted.

11. Admit that at all times relevant hereto, William A. Jasper was a management employee of Rail Link, Inc.

RESPONSE: Admitted.

12. Admit that at all times relevant hereto, William A. Jasper and James W. Benz were the sole officers and directors of Commonwealth Railway, Incorporated and Carolina Coastal Railway, Inc.

RESPONSE: Admitted.

13. Admit that Commonwealth Railway, Incorporated and Carolina Coastal Railway, Inc. operated short line railroads.

RESPONSE: Admitted.

14. Admit that the short line railroads operated by Commonwealth Railway, Incorporated and Carolina Coastal Railway, Inc. were common carriers by railroad touching upon, affecting and engaged in interstate commerce as defined by the Federal Employers Liability Act.

RESPONSE: Admitted.

15. Admit that Carolina and Northwestern Railroad, Inc. was a wholly owned subsidiary of Rail Link, Inc. from May 1990 until January 13, 1995, when its corporate existence was terminated.

RESPONSE: Admitted.

16. Admit that from May 1990 until January 13, 1995, Rail Link, Inc. controlled Carolina and Northwestern Railroad, Inc.

RESPONSE: Admitted.

17. Admit that from May 1990 until January 13, 1995, James W. Benz was the president and director of Carolina and Northwestern Railroad, Inc.

RESPONSE: Admitted.

18. Admit that immediately prior to the

termination of the corporate existence of Carolina and Northwestern Railroad, Inc., James W. Benz and William A. Jasper were the sole officers and directors of Carolina and Northwestern Railroad, Inc.

RESPONSE: Admitted.

19. Admit that Carolina and Northwestern Railroad, Inc. operated a short line railroad.

RESPONSE: Admitted.

20. Admit that the short line railroad operated by Carolina and Northwestern Railroad, Inc. was a common carrier by railroad touching upon, affecting and engaged in interstate commerce as defined by the Federal Employers Liability Act.

RESPONSE: Admitted.

1995 ANNUAL REPORT
COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

CORPORATE NAME:
COMMONWEALTH RAILWAY, INCORPORATED

* * *

ADDRESS OF THE CORPORATION'S PRINCIPAL OFFICE:
One Park West Cir. Suite 203
Midlothian, VA 232113

* * *

1995 ANNUAL REPORT
COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

CORPORATE NAME:
CAROLINA COASTAL RAILWAY, INCORPORATED

* * *

ADDRESS OF THE CORPORATION'S PRINCIPAL OFFICE:
One Park West Cir. Suite 203
Midlothian, VA 232113

* * *

1995 ANNUAL REPORT
COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

CORPORATE NAME:
RAIL LINK, INC.

* * *

ADDRESS OF THE CORPORATION'S PRINCIPAL OFFICE:
One Park West Cir. Suite 203
Midlothian, VA 232113

* * *

RAILROAD AUDIT FORM

Name of Railroad: Rail Link, Inc.
Policy Type: Comprehensive Railroad Liability
Policy Period: March 11, 1994 to March 11, 1995

SHORTLINE OPERATIONS

In compliance with the TERMS AND CONDITIONS of your Policy, you are hereby requested to provide your actual payroll/revenues for the policy period stated above.

Rating Basis: (X) Payroll ( ) Revenue
$13,91 PER $100
Actual Amount: 141,651

The information provided is hereby true and correct to the best of our knowledge.

[signature of Wm. A. Jasper] 4/11/95
Signature of an Authorized Railroad Official — Date

handwritten: "Gen. Mgr."
Title

* * *

A PROFILE OF RAIL LINK, INC.

1. Rail Link's current operations:

SWITCHING OPERATIONS

ITT Ravonier, Jesup, GREAT AMERICAN

* * *

Weyerhaeuser Paper Company, Plymouth, NC

* * *

Lubrizol Corporation, Deer Park, TX

* * *

Exxon Chemical, Baton Rouge, LA

* * *

Georgia Gulf, Pasadena, TX

* * *

International Paper Company, Pine Bluff, AR

* * *

Solvay Polymers Corp., Deer Park, TX

* * *

BASF Corp., Freeport, TX

* * *

Dow Chemical, Freeport, TX

* * *

Holston Defense Corp., Kingsport, TX

* * *

General Chemical Corp., and Church & Dwight Co., Inc., Green River, WY

* * *

Boeing Support Services, Puyallup, WA

* * *

Amoco Chemical Company, Alvin, TX

* * *

Union Camp Corp., Eastover, SC

* * *

Phillips Petroleum Co., Borger, TX

* * *

Shintech, Inc. & K-Bin, Inc., Freeport, TX

* * *

SHORTLINE RAILROADS:

Carolina Coastal Railway

* * *

Commonwealth Railroad

* * *

Carolina & North Western

* * *

OTHER OPERATIONS:

LOCOMOTIVE LEASING & REPAIRS

* * *

TRACK MAINTENANCE FOR OTHERS: - Included under the Shortline/Switching Liability coverages

* * *

TRACK MAINTENANCE FOR OTHERS: SEPARATE LIMITS/SIR

* * *

BOX CAR CLEANING

* * *

LOADING AND UNLOADING CARS

* * *

[PACIFIC INSURANCE COMPANY'S
POLICY DEFINITION]

* * *

13. Employers Liability

Employers Liability means liability imposed on the insured for Bodily Injury sustained by employees of the Insured in the course of their employment under the Federal Employers Liability Act, U.S. Code (1970) Title 45, Chapter 2, Sections 51-60 and as amended. Employers Liability includes Bodily Injury resulting from occupational disease sustained by employees of the Insured in the course of their employment. In the event of an employee sustaining occupational disease, the date of the Incident shall be deemed to be the date of the first diagnosis of occupational disease by a licensed physician. As respects occupational disease, each employee sustaining occupational disease shall be deemed to be a separate incident

[PACIFIC INSURANCE COMPANY'S POLICY EXCLUSION]

II. EXCLUSIONS

This policy does not apply to:

* * *

F. Any liability imposed on the insurer under any of the following:

* * *

3. any workers compensation, employers liability (but this does not apply to the Federal Employers' Liability Act; see Employers Liability definition), occupational disease, unemployment compensation, retirement or disability benefits law or statute, or,

4. any law similar to 1, 2, or 3 above.

* * *

[AMERICAN NATIONAL EXCLUSION TAKEN FROM UNDERLYING AND INCORPORATED HARTFORD INSURANCE POLICY]

* * *

C. Exclusions

This insurance does not cover:

* * *

9. bodily injury to any person in work subject to the Federal Employer's Liability Act (45 USC Sections 51-60), any other federal laws obligating an employer to pay damages to any employee due to bodily injury arising out of or in the course of employment, or any amendment to those laws.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

PACIFIC INSURANCE COMPANY,
PLAINTIFF,
v. Civil Action No. 3:96cv22
RAIL LINK, INC., et al.
DEFENDANTS.

PACIFIC INSURANCE COMPANY'S MOTION TO RECONSIDER

Plaintiff, PACIFIC INSURANCE COMPANY ("Pacific"), pursuant to Federal Rule Civil Procedure 59, requests that this Court Amend the Judgment entered on July 30, 1997 and grant Pacific judgment in its favor in the amount of $1,861,331.38, plus prejudgment and postjudgment interest and allowable costs, and such other and further relief as this Court deems just and proper. In support thereof, Pacific submits a memorandum of law, a copy of which is attached hereto and incorporated herein by reference.

PACIFIC INSURANCE COMPANY

By: /S/
Its Counsel

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804/320-8918

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8300 Sears Tower, 233 South Wacker Drive
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312/474-7900

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Pacific Insurance Company's Motion to Reconsider, was hand delivered, this 13 day of August, 1997 to the following:

William H. Shewmake, Esquire
Shewmake, Baronian & Parkinson
5413 Patterson Avenue, Suite 101
Richmond, Virginia 23226

Gary J. Spahn, Esquire
Mays & Valentine
1111 E. Main Street
Richmond, Virginia, 23219

/S/

Supreme Court, U.S.
F I L E D
DEC 7 1998
CLERK

No. 98-742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN NATIONAL FIRE INSURANCE COMPANY,

Petitioner,

vs.

PACIFIC INSURANCE COMPANY
and RAIL LINK, INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Attorneys for Respondent Pacific Insurance Company

Counsel of Record

STATEMENT PURSUANT TO RULE 29.6

The parent of respondent Pacific Insurance Company is CNA Financial Corporation. Marine Office of America Corporation is the only nonwholly owned subsidiary of respondent Pacific Insurance Company.

The parent of respondent Rail Link, Incorporated is Genessee & Wyoming, Inc. There are no nonwholly owned subsidiaries of respondent Rail Link, Incorporated.

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STATEMENT OF THE CASE

The Petition arises from an insurance coverage declaratory judgment action governed by the substantive law of the Commonwealth of Virginia. Petitioner American National Fire Insurance Company ("American National") seeks to engage the Court in a fact-based inquiry of issues that were not properly before either the District Court or the Circuit Court, and clearly not grounds for Certiorari. Petitioner seeks to clothe this dispute in the language of Supreme Court Rule 10 by focusing on a purported "conflict" among the circuits. This argument is without merit. The Court has consistently denied this precise issue for review. Moreover, Petitioner misstates the facts and procedural history of this case. Review of this matter is not warranted because, when stripped bare, the Petitioner seeks a ruling by the Court that the District Court abused its discretion and that the Circuit Court improperly applied the proper standard of review. Certiorari should be denied under these circumstances.

A. The Petition Misstates Key Facts Underlying this Dispute.

As set forth in the Petition, this dispute arose from an accident involving an employee of respondent, Rail Link, Inc. ("Rail Link"), Christopher Womack. American National correctly states that Womack suffered injuries while performing rail-switching operations for Rail Link at a plant in Texas. American National incorrectly asserts, however, that "Rail Link created subsidiaries only for its shortline railroads, which are covered by the Federal Employers Liability Act" (Pet. at 5) and that the District Court "factually determined that FELA applied." *Id.* at 12. In truth, the record reflects that the District Court reversed its Order of July 30, 1997 (A. 33) in which it found that FELA applied to Rail Link. A. 22. Moreover, in

response to American National's Requests for Admission, Rail Link specifically denied that it created or maintained its shortline railroad subsidiaries in order to avoid liability under the Federal Employers' Liability Act. A. 8.

Womack filed suit against Rail Link seeking damages under a Texas employers' liability statute, "The Railroad Act" (the "Underlying Action"). American National did not, as it claims, attempt to assert in the Underlying Action that FELA preempted Womack's claim under the Railroad Act. There is no evidence in the record, and American National cites to none, that American National raised the issue of FELA preemption in the Underlying Action or that it requested that Rail Link assert FELA preemption as a defense to Womack's claim.[1]

At the time of the accident, Rail Link was insured by both Pacific and American National. American National provided coverage for employers' liability claims except for claims brought pursuant to FELA. American National mischaracterizes, however, the coverage provided by Pacific. Contrary to American National's assertions, the Pacific policy excluded coverage for employers' liability claims *unless* such claims were brought pursuant to FELA. A. 88-89. This was precisely the District Court's ruling in granting Pacific's Motion for Judgment on the Pleadings, which set into motion American National's circuitous and misguided efforts to introduce evidence not in the record and not relevant to the determination of coverage. American National improperly and untimely raised the FELA issue below, and continues here under the guise of Supreme Court Rule 10 to seek to circumvent Virginia law.

---

1. As American National never attempted to raise the issue of FELA preemption in the Underlying Action, there was no "conflict of interest" between American National and Rail Link in the Underlying Action, as American National claims. *See* Pet. at 14.

B. The Petition Misrepresents the Procedural History of this Case.

Summarized briefly, Pacific filed this declaratory judgment action after it jointly funded a settlement of the Underlying Action with American National. As American National concedes in its Petition, "[w]hoever was found in the declaratory judgment action to provide coverage for the Womack accident would reimburse the other." Pet. at 6.

Count I of Pacific's Complaint sought a declaration that Pacific did not provide coverage for the Underlying Action, while American National did provide coverage. Pacific moved pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings as to Count I. The District Court granted the motion (A. 43-46), and then dismissed the remaining counts of the Complaint as moot. A. 42. Significantly, the Circuit Court correctly noted that American National did not argue in response to Pacific's Rule 12(c) motion that Womack's claim could have or should have been brought under FELA. A. 6.

Despite the District Court's ruling and American National's explicit understanding regarding reimbursement, American National refused to pay Pacific the liquidated damages. Pacific filed a Rule 59(e) motion, which asked the District Court to amend the judgment to reflect monetary damages consistent with the declaratory relief. A. 61. In its brief in opposition to this motion, American National claimed that FELA *could have been* a defense to the settled Underlying Action. A. 65. As the District Court eventually ruled and the Circuit Court affirmed, American National failed to assert FELA preemption as a defense to coverage until it filed its brief in opposition to Pacific's Rule 59(e) motion, after the District Court had granted Pacific judgment on the pleadings. A. 6.[2] American National

2. While American National implies that it raised the issue of FELA preemption in its answer and counterclaim (Pet. at 6, citing A. 49-52). (Cont'd)

never sought affirmative relief from the District Court on the grounds that FELA preempted Womack's Railroad Act claim. A. 6; A.13.[3]

The District Court initially veered off course and allowed briefing on the FELA issue even though it had already granted judgment to Pacific and dismissed the case. This detour culminated in an Order granting monetary relief to American National. A. 33. In the face of this clearly erroneous Order, Pacific and Rail Link each filed motions to reconsider pursuant to Rule 59(e). Pacific's motion was granted, and the Order granting relief to American National was reversed. A. 22-23. Specifically, in its Final Order, the District Court admitted that its detour was erroneous and amended its prior judgment to clarify Pacific's entitlement to monetary relief from American National. A. 24-32.

Still unwilling to pay the agreed upon liquidated damages, American National appealed. The Circuit Court affirmed, holding that the District Court did not abuse its discretion in granting Pacific's Rule 59(e) motion. *Pacific Ins. Co. v. American Nat. Ins. Co.*, 148 F.3d 396 (4th Cir. 1998). The

(Cont'd)
Neither pleading references FELA nor asserts that American National did not cover Womack's claim because FELA preempts the Railroad Act.

3. American National incorrectly implies that the Circuit Court failed to consider American National's reference to FELA at the August 15, 1996 hearing. Pet. at 16. To the contrary, the Circuit Court addressed American National's brief mention of FELA at the August 15 hearing but correctly noted that American National did not argue that FELA preempted Womack's claim under the Railroad Act. A. 6, n.1. Moreover, at the August 15, 1996 hearing, counsel for Pacific pointed out that Womack had not asserted a FELA claim in the Underlying Action. *See* A. 30.

Circuit Court also rejected American National's attempt to raise the claim of FELA preemption after the District Court had granted judgment to Pacific. A. 13-14. The Circuit Court did not, as American National claims, hold that the District Court could grant Pacific a money judgment without addressing FELA's applicability because American National did not file a Rule 59(e) motion. Pet. at 12. Rather, the Circuit Court correctly held that even if the District Court had treated American National's brief in opposition to Pacific's first Rule 59(e) motion as a motion for affirmative relief, such a motion would have been untimely. A. 13. Moreover, the Circuit Court held that American National could not raise the issue of the applicability of FELA for the first time in a Rule 59(e) motion because it had failed to raise the issue before the District Court granted judgment to Pacific. A. 13-14. As the Circuit Court held, Rule 59(e) motions may *not* be used

> to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance.

A. 11 (citing cases from the First, Fourth, Seventh and Eighth Circuits).

On November 2, 1998, American National filed its Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS TWICE DENIED WRITS OF CERTIORARI ON THIS PRECISE ISSUE, AND THIS CASE DOES NOT RAISE ANY NEW IMPORTANT MATTERS WHICH WARRANT REVIEW.

The Petition for Writ of Certiorari should be denied because this case does not raise any important matters over which the United States Courts of Appeals are in conflict. *See* Supreme Court Rule 10. Indeed, the Court has previously denied Petitions for Writ of Certiorari in two cases raising precisely the same issues raised in the petition in this case. *See Sun-Tek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179, 182 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1009, 109 S. Ct. 793, 102 L. Ed. 2d 784 (1989); *Hidle v. Geneva Cty Bd. of Ed.*, 792 F.2d 1098, 1100 (11th Cir. 1986), *rehearing denied*, 798 F.2d 1420 (11th Cir. 1986), *cert. denied, Geneva Cty. Bd. of Ed. v. Hidle*, 479 U.S. 1088, 107 S. Ct. 1296, 94 L. Ed. 2d 152 (1987). On both occasions this Court denied certiorari despite the existence of the purported conflict.

American National does not argue any change of circumstances that makes the issue more appropriate for review now than when the Court previously denied certiorari on this issue. Rather, the conflict American National cites is an attempt to clothe the petition in the language of Supreme Court Rule 10. The Petition is, in its entirety, merely an invitation for the Court to review the District Court's decision for alleged abuse of discretion, and in turn the Circuit Court's ruling for the allegedly improper application of the proper standard of review.

II.

THE PETITION SHOULD BE DENIED BECAUSE IT SEEKS A FACT-BASED REVIEW OF THE DECISIONS RENDERED BELOW.

The Petition states quite clearly that it seeks review by the Court on the basis of the District Court's alleged abuse of discretion and the Circuit Court's allegedly improper application of the correct standard of review. The headings preceding American National's arguments demonstrate that it seeks fact-based review of this case. As such, American National does not satisfy any of the considerations for review pursuant to Supreme Court Rule 10. Indeed, the Petition fits precisely within the last sentence of Rule 10, which states,

> [a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The District Court properly applied the substantive law of the Commonwealth of Virginia and the Circuit Court properly affirmed. American National's attempt to use Supreme Court Rule 10 to interject an issue of state law before the Court is without support. The ship sailed on American National's "FELA theory" when the Underlying Action, not brought under FELA, was settled. American National's protracted and groundless efforts to avoid its coverage obligations, as governed by Virginia law, do not justify review by the Court.

CONCLUSION

Respectfully, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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